To our shareowners:

Something strange and remarkable has happened over the last 20 years. Take a look at these numbers:

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<tr>
<th>Year</th>
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<td>1999</td>
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The percentages represent the share of physical gross merchandise sales sold on Amazon by independent third-party sellers – mostly small- and medium-sized businesses – as opposed to Amazon retail’s own first party sales. Third-party sales have grown from 3% of the total to 58%. To put it bluntly:

*Third-party sellers are kicking our first party butt. BADLY.*

And it’s a high bar too because our first-party business has grown dramatically over that period, from $1.6 billion in 1999 to $117 billion this past year. The compound annual growth rate for our first-party business in that time period is 25%. But in that same time, third-party sales have grown from $0.1 billion to $160 billion – a compound annual growth rate of 52%. To provide an external benchmark, eBay’s gross merchandise sales in that period have grown at a compound rate of 20%, from $2.8 billion to $95 billion.

Why did independent sellers do so much better selling on Amazon than they did on eBay? And why were independent sellers able to grow so much faster than Amazon’s own highly organized first-party sales organization? There isn’t one answer, but we do know one extremely important part of the answer:

We helped independent sellers compete against our first-party business by investing in and offering them the very best selling tools we could imagine and build. There are many such tools, including tools that help sellers manage inventory, process payments, track shipments, create reports, and sell across borders – and we’re inventing more every year. But of great importance are Fulfillment by Amazon and the Prime membership program. In combination, these two programs meaningfully improved the customer experience of buying from independent sellers. With the success of these two programs now so well established, it’s difficult for most people to fully appreciate today just how radical those two offerings were at the time we launched them. We invested in both of these programs at significant financial risk and after much internal debate. We had to continue investing
significantly over time as we experimented with different ideas and iterations. We could not foresee with certainty what those programs would eventually look like, let alone whether they would succeed, but they were pushed forward with intuition and heart, and nourished with optimism.

**Intuition, curiosity, and the power of wandering**

From very early on in Amazon’s life, we knew we wanted to create a culture of builders – people who are curious, explorers. They like to invent. Even when they’re experts, they are “fresh” with a beginner’s mind. They see the way we do things as just the way we do things now. A builder’s mentality helps us approach big, hard-to-solve opportunities with a humble conviction that success can come through iteration: invent, launch, reinvent, relaunch, start over, rinse, repeat, again and again. They know the path to success is anything but straight.

Sometimes (often actually) in business, you do know where you’re going, and when you do, you can be efficient. Put in place a plan and execute. In contrast, wandering in business is not efficient … but it’s also not random. It’s guided – by hunch, gut, intuition, curiosity, and powered by a deep conviction that the prize for customers is big enough that it’s worth being a little messy and tangential to find our way there. Wandering is an essential counter-balance to efficiency. You need to employ both. The outsized discoveries – the “non-linear” ones – are highly likely to require wandering.

AWS’s millions of customers range from startups to large enterprises, government entities to nonprofits, each looking to build better solutions for their end users. We spend a lot of time thinking about what those organizations want and what the people inside them – developers, dev managers, ops managers, CIOs, chief digital officers, chief information security officers, etc. – want.

Much of what we build at AWS is based on listening to customers. It’s critical to ask customers what they want, listen carefully to their answers, and figure out a plan to provide it thoughtfully and quickly (speed matters in business!). No business could thrive without that kind of customer obsession. But it’s also not enough. The biggest needle movers will be things that customers don’t know to ask for. We must invent on their behalf. We have to tap into our own inner imagination about what’s possible.

AWS itself – as a whole – is an example. No one asked for AWS. No one. Turns out the world was in fact ready and hungry for an offering like AWS but didn’t know it. We had a hunch, followed our curiosity, took the necessary financial risks, and began building – reworking, experimenting, and iterating countless times as we proceeded.

Within AWS, that same pattern has recurred many times. For example, we invented DynamoDB, a highly scalable, low latency key-value database now used by thousands of AWS customers. And on the listening-carefully-to-customers side, we heard loudly that companies felt constrained by their commercial database options and had been unhappy with their database providers for decades – these offerings are expensive, proprietary, have high-lock-in and punitive licensing terms. We spent several years building our own database engine, Amazon Aurora, a fully-managed MySQL and PostgreSQL-compatible service with the same or better durability and availability as the commercial engines, but at one-tenth of the cost. We were not surprised when this worked.

But we’re also optimistic about specialized databases for specialized workloads. Over the past 20 to 30 years, companies ran most of their workloads using relational databases. The broad familiarity with relational databases among developers made this technology the go-to even when it wasn’t ideal. Though sub-optimal, the data set sizes were often small enough and the acceptable query latencies long enough that you could make it work. But today, many applications are storing very large amounts of data – terabytes and petabytes. And the requirements for apps have changed. Modern applications are driving the need for low latencies, real-time processing, and the ability to process millions of requests per second. It’s not just key-value stores like DynamoDB, but also in-memory databases like Amazon ElastiCache, time series databases like Amazon Timestream, and ledger solutions like Amazon Quantum Ledger Database – the right tool for the right job saves money and gets your product to market faster.
We’re also plunging into helping companies harness Machine Learning. We’ve been working on this for a long time, and, as with other important advances, our initial attempts to externalize some of our early internal Machine Learning tools were failures. It took years of wandering – experimentation, iteration, and refinement, as well as valuable insights from our customers – to enable us to find SageMaker, which launched just 18 months ago. SageMaker removes the heavy lifting, complexity, and guesswork from each step of the machine learning process – democratizing AI. Today, thousands of customers are building machine learning models on top of AWS with SageMaker. We continue to enhance the service, including by adding new reinforcement learning capabilities. Reinforcement learning has a steep learning curve and many moving parts, which has largely put it out of reach of all but the most well-funded and technical organizations, until now. None of this would be possible without a culture of curiosity and a willingness to try totally new things on behalf of customers. And customers are responding to our customer-centric wandering and listening – AWS is now a $30 billion annual run rate business and growing fast.

**Imagining the impossible**

Amazon today remains a small player in global retail. We represent a low single-digit percentage of the retail market, and there are much larger retailers in every country where we operate. And that’s largely because nearly 90% of retail remains offline, in brick and mortar stores. For many years, we considered how we might serve customers in physical stores, but felt we needed first to invent something that would really delight customers in that environment. With Amazon Go, we had a clear vision. Get rid of the worst thing about physical retail: checkout lines. No one likes to wait in line. Instead, we imagined a store where you could walk in, pick up what you wanted, and leave.

Getting there was hard. Technically hard. It required the efforts of hundreds of smart, dedicated computer scientists and engineers around the world. We had to design and build our own proprietary cameras and shelves and invent new computer vision algorithms, including the ability to stitch together imagery from hundreds of cooperating cameras. And we had to do it in a way where the technology worked so well that it simply receded into the background, invisible. The reward has been the response from customers, who’ve described the experience of shopping at Amazon Go as “magical.” We now have 10 stores in Chicago, San Francisco, and Seattle, and are excited about the future.

**Failure needs to scale too**

As a company grows, *everything* needs to scale, including the size of your failed experiments. If the size of your failures isn’t growing, you’re not going to be inventing at a size that can actually move the needle. Amazon will be experimenting at the right scale for a company of our size if we occasionally have multibillion-dollar failures. Of course, we won’t undertake such experiments cavalierly. We will work hard to make them good bets, but not all good bets will ultimately pay out. This kind of large-scale risk taking is part of the service we as a large company can provide to our customers and to society. The good news for shareowners is that a single big winning bet can more than cover the cost of many losers.

Development of the Fire phone and Echo was started around the same time. While the Fire phone was a failure, we were able to take our learnings (as well as the developers) and accelerate our efforts building Echo and Alexa. The vision for Echo and Alexa was inspired by the Star Trek computer. The idea also had origins in two other arenas where we’d been building and wandering for years: machine learning and the cloud. From Amazon’s early days, machine learning was an essential part of our product recommendations, and AWS gave us a front row seat to the capabilities of the cloud. After many years of development, Echo debuted in 2014, powered by Alexa, who lives in the AWS cloud.

No customer was asking for Echo. This was definitely us wandering. Market research doesn’t help. If you had gone to a customer in 2013 and said “Would you like a black, always-on cylinder in your kitchen about the size of a Pringles can that you can talk to and ask questions, that also turns on your lights and plays music?” I guarantee you they’d have looked at you strangely and said “No, thank you.”
Since that first-generation Echo, customers have purchased more than 100 million Alexa-enabled devices. Last year, we improved Alexa’s ability to understand requests and answer questions by more than 20%, while adding billions of facts to make Alexa more knowledgeable than ever. Developers doubled the number of Alexa skills to over 80,000, and customers spoke to Alexa tens of billions more times in 2018 compared to 2017. The number of devices with Alexa built-in was more than doubled in 2018. There are now more than 150 different products available with Alexa built-in, from headphones and PCs to cars and smart home devices. Much more to come!

One last thing before closing. As I said in the first shareholder letter more than 20 years ago, our focus is on hiring and retaining versatile and talented employees who can think like owners. Achieving that requires investing in our employees, and, as with so many other things at Amazon, we use not just analysis but also intuition and heart to find our way forward.

Last year, we raised our minimum wage to $15-an-hour for all full-time, part-time, temporary, and seasonal employees across the U.S. This wage hike benefitted more than 250,000 Amazon employees, as well as over 100,000 seasonal employees who worked at Amazon sites across the country last holiday. We strongly believe that this will benefit our business as we invest in our employees. But that is not what drove the decision. We had always offered competitive wages. But we decided it was time to lead – to offer wages that went beyond competitive. We did it because it seemed like the right thing to do.

Today I challenge our top retail competitors (you know who you are!) to match our employee benefits and our $15 minimum wage. Do it! Better yet, go to $16 and throw the gauntlet back at us. It’s a kind of competition that will benefit everyone.

Many of the other programs we have introduced for our employees came as much from the heart as the head. I’ve mentioned before the Career Choice program, which pays up to 95% of tuition and fees towards a certificate or diploma in qualified fields of study, leading to in-demand careers for our associates, even if those careers take them away from Amazon. More than 16,000 employees have now taken advantage of the program, which continues to grow. Similarly, our Career Skills program trains hourly associates in critical job skills like resume writing, how to communicate effectively, and computer basics. In October of last year, in continuation of these commitments, we signed the President’s Pledge to America’s Workers and announced we will be upskilling 50,000 U.S. employees through our range of innovative training programs.

Our investments are not limited to our current employees or even to the present. To train tomorrow’s workforce, we have pledged $50 million, including through our recently announced Amazon Future Engineer program, to support STEM and CS education around the country for elementary, high school, and university students, with a particular focus on attracting more girls and minorities to these professions. We also continue to take advantage of the incredible talents of our veterans. We are well on our way to meeting our pledge to hire 25,000 veterans and military spouses by 2021. And through the Amazon Technical Veterans Apprenticeship program, we are providing veterans on-the-job training in fields like cloud computing.

A huge thank you to our customers for allowing us to serve you while always challenging us to do even better, to our shareowners for your continuing support, and to all our employees worldwide for your hard work and pioneering spirit. Teams all across Amazon are listening to customers and wandering on their behalf!

As always, I attach a copy of our original 1997 letter. It remains Day 1.

Sincerely,

Jeffrey P. Bezos
Founder and Chief Executive Officer
Amazon.com, Inc.
To our shareholders:

Amazon.com passed many milestones in 1997: by year-end, we had served more than 1.5 million customers, yielding 838% revenue growth to $147.8 million, and extended our market leadership despite aggressive competitive entry.

But this is Day 1 for the Internet and, if we execute well, for Amazon.com. Today, online commerce saves customers money and precious time. Tomorrow, through personalization, online commerce will accelerate the very process of discovery. Amazon.com uses the Internet to create real value for its customers and, by doing so, hopes to create an enduring franchise, even in established and large markets.

We have a window of opportunity as larger players marshal the resources to pursue the online opportunity and as customers, new to purchasing online, are receptive to forming new relationships. The competitive landscape has continued to evolve at a fast pace. Many large players have moved online with credible offerings and have devoted substantial energy and resources to building awareness, traffic, and sales. Our goal is to move quickly to solidify and extend our current position while we begin to pursue the online commerce opportunities in other areas. We see substantial opportunity in the large markets we are targeting. This strategy is not without risk: it requires serious investment and crisp execution against established franchise leaders.

It’s All About the Long Term

We believe that a fundamental measure of our success will be the shareholder value we create over the long term. This value will be a direct result of our ability to extend and solidify our current market leadership position. The stronger our market leadership, the more powerful our economic model. Market leadership can translate directly to higher revenue, higher profitability, greater capital velocity, and correspondingly stronger returns on invested capital.

Our decisions have consistently reflected this focus. We first measure ourselves in terms of the metrics most indicative of our market leadership: customer and revenue growth, the degree to which our customers continue to purchase from us on a repeat basis, and the strength of our brand. We have invested and will continue to invest aggressively to expand and leverage our customer base, brand, and infrastructure as we move to establish an enduring franchise.

Because of our emphasis on the long term, we may make decisions and weigh tradeoffs differently than some companies. Accordingly, we want to share with you our fundamental management and decision-making approach so that you, our shareholders, may confirm that it is consistent with your investment philosophy:

- We will continue to focus relentlessly on our customers.
- We will continue to make investment decisions in light of long-term market leadership considerations rather than short-term profitability considerations or short-term Wall Street reactions.
- We will continue to measure our programs and the effectiveness of our investments analytically, to jettison those that do not provide acceptable returns, and to step up our investment in those that work best. We will continue to learn from both our successes and our failures.
• We will make bold rather than timid investment decisions where we see a sufficient probability of gaining market leadership advantages. Some of these investments will pay off, others will not, and we will have learned another valuable lesson in either case.

• When forced to choose between optimizing the appearance of our GAAP accounting and maximizing the present value of future cash flows, we’ll take the cash flows.

• We will share our strategic thought processes with you when we make bold choices (to the extent competitive pressures allow), so that you may evaluate for yourselves whether we are making rational long-term leadership investments.

• We will work hard to spend wisely and maintain our lean culture. We understand the importance of continually reinforcing a cost-conscious culture, particularly in a business incurring net losses.

• We will balance our focus on growth with emphasis on long-term profitability and capital management. At this stage, we choose to prioritize growth because we believe that scale is central to achieving the potential of our business model.

• We will continue to focus on hiring and retaining versatile and talented employees, and continue to weight their compensation to stock options rather than cash. We know our success will be largely affected by our ability to attract and retain a motivated employee base, each of whom must think like, and therefore must actually be, an owner.

We aren’t so bold as to claim that the above is the “right” investment philosophy, but it’s ours, and we would be remiss if we weren’t clear in the approach we have taken and will continue to take.

With this foundation, we would like to turn to a review of our business focus, our progress in 1997, and our outlook for the future.

Obsess Over Customers

From the beginning, our focus has been on offering our customers compelling value. We realized that the Web was, and still is, the World Wide Wait. Therefore, we set out to offer customers something they simply could not get any other way, and began serving them with books. We brought them much more selection than was possible in a physical store (our store would now occupy 6 football fields), and presented it in a useful, easy-to-search, and easy-to-browse format in a store open 365 days a year, 24 hours a day. We maintained a dogged focus on improving the shopping experience, and in 1997 substantially enhanced our store. We now offer customers gift certificates, 1-ClickSM shopping, and vastly more reviews, content, browsing options, and recommendation features. We dramatically lowered prices, further increasing customer value. Word of mouth remains the most powerful customer acquisition tool we have, and we are grateful for the trust our customers have placed in us. Repeat purchases and word of mouth have combined to make Amazon.com the market leader in online bookselling.

By many measures, Amazon.com came a long way in 1997:

• Sales grew from $15.7 million in 1996 to $147.8 million – an 838% increase.

• Cumulative customer accounts grew from 180,000 to 1,510,000 – a 738% increase.

• The percentage of orders from repeat customers grew from over 46% in the fourth quarter of 1996 to over 58% in the same period in 1997.

• In terms of audience reach, per Media Metrix, our Web site went from a rank of 90th to within the top 20.

• We established long-term relationships with many important strategic partners, including America Online, Yahoo!, Excite, Netscape, GeoCities, AltaVista, @Home, and Prodigy.
Infrastructure

During 1997, we worked hard to expand our business infrastructure to support these greatly increased traffic, sales, and service levels:

- Amazon.com’s employee base grew from 158 to 614, and we significantly strengthened our management team.
- Distribution center capacity grew from 50,000 to 285,000 square feet, including a 70% expansion of our Seattle facilities and the launch of our second distribution center in Delaware in November.
- Inventories rose to over 200,000 titles at year-end, enabling us to improve availability for our customers.
- Our cash and investment balances at year-end were $125 million, thanks to our initial public offering in May 1997 and our $75 million loan, affording us substantial strategic flexibility.

Our Employees

The past year’s success is the product of a talented, smart, hard-working group, and I take great pride in being a part of this team. Setting the bar high in our approach to hiring has been, and will continue to be, the single most important element of Amazon.com’s success.

It’s not easy to work here (when I interview people I tell them, “You can work long, hard, or smart, but at Amazon.com you can’t choose two out of three”), but we are working to build something important, something that matters to our customers, something that we can all tell our grandchildren about. Such things aren’t meant to be easy. We are incredibly fortunate to have this group of dedicated employees whose sacrifices and passion build Amazon.com.

Goals for 1998

We are still in the early stages of learning how to bring new value to our customers through Internet commerce and merchandising. Our goal remains to continue to solidify and extend our brand and customer base. This requires sustained investment in systems and infrastructure to support outstanding customer convenience, selection, and service while we grow. We are planning to add music to our product offering, and over time we believe that other products may be prudent investments. We also believe there are significant opportunities to better serve our customers overseas, such as reducing delivery times and better tailoring the customer experience. To be certain, a big part of the challenge for us will lie not in finding new ways to expand our business, but in prioritizing our investments.

We now know vastly more about online commerce than when Amazon.com was founded, but we still have so much to learn. Though we are optimistic, we must remain vigilant and maintain a sense of urgency. The challenges and hurdles we will face to make our long-term vision for Amazon.com a reality are several: aggressive, capable, well-funded competition; considerable growth challenges and execution risk; the risks of product and geographic expansion; and the need for large continuing investments to meet an expanding market opportunity. However, as we’ve long said, online bookselling, and online commerce in general, should prove to be a very large market, and it’s likely that a number of companies will see significant benefit. We feel good about what we’ve done, and even more excited about what we want to do.

1997 was indeed an incredible year. We at Amazon.com are grateful to our customers for their business and trust, to each other for our hard work, and to our shareholders for their support and encouragement.

Jeffrey P. Bezos  
Founder and Chief Executive Officer  
Amazon.com, Inc.
Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon

Brussels, 17 July 2019

The European Commission has opened a formal antitrust investigation to assess whether Amazon's use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules.

Commissioner Margrethe Vestager, in charge of competition policy, said: “European consumers are increasingly shopping online. E-commerce has boosted retail competition and brought more choice and better prices. We need to ensure that large online platforms don’t eliminate these benefits through anti-competitive behaviour. I have therefore decided to take a very close look at Amazon’s business practices and its dual role as marketplace and retailer, to assess its compliance with EU competition rules.”

Amazon has a dual role as a platform: (i) it sells products on its website as a retailer; and (ii) it provides a marketplace where independent sellers can sell products directly to consumers.

When providing a marketplace for independent sellers, Amazon continuously collects data about the activity on its platform. Based on the Commission’s preliminary fact-finding, Amazon appears to use competitively sensitive information – about marketplace sellers, their products and transactions on the marketplace.

As part of its in-depth investigation the Commission will look into:

- the standard agreements between Amazon and marketplace sellers, which allow Amazon’s retail business to analyse and use third party seller data. In particular, the Commission will focus on whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition.

- the role of data in the selection of the winners of the “Buy Box” and the impact of Amazon’s potential use of competitively sensitive marketplace seller information on that selection. The “Buy Box” is displayed prominently on Amazon and allows customers to add items from a specific retailer directly into their shopping carts. Winning the “Buy Box” seems key for marketplace sellers as a vast majority of transactions are done through it.

If proven, the practices under investigation may breach EU competition rules on anticompetitive agreements between companies (Article 101 of the Treaty on the Functioning of the European Union (TFEU)) and/or on the abuse of a dominant position (Articles 102 TFEU).

The Commission will now carry out its in-depth investigation as a matter of priority. The opening of a formal investigation does not prejudge its outcome.

Background

Article 101 of the TFEU prohibits anticompetitive agreements and decisions of associations of undertakings that prevent, restrict or distort competition within the EU’s Single Market. Article 102 of the TFEU prohibits the abuse of a dominant position. The implementation of these provisions is defined in the Antitrust Regulation (Council Regulation No 1/2003), which can also be applied by the national competition authorities.

Article 11(6) of the Antitrust Regulation provides that the opening of proceedings by the Commission relieves the competition authorities of the Member States of their competence to apply EU competition rules to the practices concerned. Article 16(1) further provides that national courts must avoid adopting decisions that would conflict with a decision contemplated by the Commission in proceedings it has initiated.

The Commission has informed Amazon and the competition authorities of the Member States that it has opened proceedings in this case.

There is no legal deadline for bringing an antitrust investigation to an end. The duration of an antitrust investigation depends on a number of factors, including the complexity of the case, the extent to which
the undertakings concerned cooperate with the Commission and the exercise of the rights of defence. More information on the investigation will be available on the Commission's competition website, in the public case register under case number AT.40462.

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BEFORE THE FEDERAL TRADE COMMISSION
Washington, D.C. 20580

Petition for the Investigation of Amazon.com, Inc.

SUBMITTED BY

THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
COMMUNICATIONS WORKERS OF AMERICA,
UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION,
SERVICE EMPLOYEES INTERNATIONAL UNION, and
CHANGE TO WIN
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Petitioners ................................................................................................................................................ A-1
I. Introduction

The International Brotherhood of Teamsters, the Communications Workers of America, the United Food and Commercial Workers International Union, Service Employees International Union, and Change to Win submit this Petition requesting that the Federal Trade Commission initiate an investigation of Amazon.com, Inc., pursuant to the agency’s powers under Section 6(b) of the Federal Trade Commission Act. Amazon’s multiple roles as marketplace, retailer, and logistics and cloud computing provider enable and incentivize its anti-competitive practices, and the company’s dominance allows it to squeeze profit from and reduce choice among workers, consumers, merchants, and competitors. The legality of Amazon’s practices, the scope of its power, and the adequacy of existing regulation have prompted investigations by regulators around the world, but in many instances the company has responded to these investigations insufficiently or refused to respond entirely. As a result, many of Amazon’s most concerning practices remain opaque.

Petitioners call on the FTC to launch an investigation of Amazon’s anti-competitive behavior. Specifically, we believe the Commission should examine whether:

1. Amazon is maintaining direct and indirect control over the prices of goods on its ecommerce and cloud computing platforms;
2. Amazon is tying favorable search rankings to its own profit and the purchase of unrelated Amazon services;
3. Amazon is engaging in price discrimination against users of competing platforms;
4. Amazon is using data obtained as a platform to its competitive advantage as a retailer and provider of cloud computing software; and
5. Amazon is depressing wages in local labor markets and/or throughout its fissured workforce.

Amazon is unique, not only in its current size and growth trajectory, but in the breadth of its interests across markets and its expansion into all levels of the supply chain. The company demands urgent inquiry, best achieved though the Federal Trade Commission’s unique authority and expertise.

II. Petitioners

The petitioning parties (“Petitioners”) include the country’s major labor unions, representing a combined 5.3 million working people across all industries and sectors of the economy. Founded in 1903, the International Brotherhood of Teamsters represents 1.4 million hardworking men and women throughout the United States, Canada and Puerto Rico. The Communications Workers of America represents working people in telecommunications, customer service, media, airlines, health care, public service and education, manufacturing, and other industries. The United Food and Commercial Workers International Union is the largest private sector union in the United States, representing 1.3 million professionals and their families in grocery stores, meatpacking, food processing, retail shops and other industries. Service Employees International Union unites 2 million diverse members working in the healthcare industry, in the public sector, and in property services in the United States, Canada, and
Puerto Rico. Change to Win, a democratic federation of labor unions, has along with its affiliates engaged the Federal Trade Commission on a number of issues, including fair competition in the franchise industry and pharmacy benefit manager sector, toward the goal of eliminating anticompetitive and abusive business practices that harm both workers and consumers.¹

Petitioners urge competition authorities like the Federal Trade Commission ("FTC") to protect workers from the unbridled market power of increasingly large and concentrated employers. Petitioners also believe that competition authorities should level the playing field for all those who come into contact with concentrated markets, particularly the small- and medium-sized businesses that supply goods and services on the platforms that have come to dominate our economy.

III. Section 6(b) of the FTC Act

Section 6 of the Federal Trade Commission Act distinguishes the FTC “from most other antitrust or consumer protection agencies in the world,”² and provides the Commission with a uniquely powerful tool for gathering non-public information that can inform its enforcement mission. Section 6(a) grants the Commission general powers “[t]o gather and compile information” about nearly any business that affects commerce. Section 6(b), however, is more specific and more powerful; it empowers the Commission “[t]o require, by general or special orders, persons, partnerships, and corporations…to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions...”³

Pursuant to Section 6(b), the FTC has the power to compel the subject or subjects of a study to provide information, and allows the Commission to obtain answers to specific questions where such information would not be available through subpoena because no documents exist that contain the desired information.⁴ Section 6(f), in turn, authorizes the Commission, subject to applicable confidentiality constraints, to “make public from time to time” portions of the information that it obtains, where disclosure would serve the public interest.⁵

In the last 20 years, the FTC has used Section 6(b) to study issues including generic drug entry,⁶ gasoline pricing manipulation after Hurricane Katrina,⁷ the mobile device industry’s security update practices,⁸ class action settlements,⁹ the credit card industry’s data security auditing,¹⁰ the data broker industry’s collection and use of consumer data,¹¹ the privacy practices of broadband providers,¹² and, most recently, small acquisitions by large technology firms.¹³ As with those areas of inquiry, the rapid growth and consolidation of ecommerce, cloud computing, and related markets urgently demand analytically rigorous assessment. As Amazon expands to touch on and dominate an increasing share of Americans’ lives, the FTC should order Amazon to provide the Commission with the data necessary to understand and develop policy responses to Amazon’s immense and growing influence.
IV. The FTC Should Investigate the Impact of Amazon’s Business Practices on Potential Competitors, Existing Competitors, Manufacturers, Sellers, Consumers, and Workers.

Amazon was founded in 1994 with the idea that it would take advantage of the rapid growth of the World Wide Web by becoming the digital “everything store.” Now, it has the third-highest market value of any publicly-traded firm in the world. Amazon’s business interests have multiplied since its founding, and it is the dominant player in domestic and global ecommerce and in cloud computing. In both markets, Amazon serves as a platform and acts as a market participant.

Ecommerce retail currently comprises 11 percent of the retail market in the U.S. and is growing more than three times as fast as retail as a whole. Based on figures Amazon released in 2019, 38 percent of online U.S. retail spending—up from only 23 percent two years earlier—and 4 percent of all U.S. retail sales took place on Amazon’s platform in 2018. More than half of all U.S. online shopping product searches begin on Amazon.com, a business-to-consumer ecommerce platform, which means that Amazon is controlling consumers’ purchase options.

Cloud computing, too, is growing rapidly. The Amazon Web Services (“AWS”) segment of Amazon’s business holds 32 percent of the cloud computing market, greater than the share held by AWS’s three largest competitors combined. Amazon has replicated its role as a platform in cloud computing, where it hosts the AWS Marketplace, a curated digital catalog through which third-party vendors sell software, data, and other products to AWS customers. In both of its Marketplaces and in adjacent markets, Amazon sets the rules.

A. The FTC Should Investigate Whether Amazon Abuses its Dominance in Ecommerce

1. Amazon Controls Prices on its Ecommerce Platform through Most-Favored-Nation-Type Restrictions

Along with Amazon, millions of third parties sell goods on the company’s business-to-consumer ecommerce platform. These third parties sell goods on Amazon’s “Marketplace,” and compete on the platform with Amazon in its capacity as a first-party retailer. As an ecommerce platform, Amazon has no meaningful competition. Amazon had $227 billion in ecommerce gross merchandise volume in 2019, representing sales by Amazon and third-party sellers on Amazon’s platform; eBay, the next largest platform by ecommerce sales, had only $95 billion, and the third-largest domestic platform, operated by Walmart, was expected to have approximately $28 billion. In 2019, the three companies were expected to represent, respectively, 38, 6, and 5 percent of the domestic ecommerce retail market.

Amazon cannot directly set prices of goods when it is acting solely as a platform and not as a retailer, but it nonetheless promotes itself as the lowest-price purveyor of the hundreds of millions of products for sale on its platform, regardless of retailer. Amazon circumvents its lack of direct control over third-party prices by imposing anti-competitive price controls that compel third-party sellers to
refrain from offering goods for sale for a lower price on competitor platforms. This has the effect of increasing prices for consumers and reinforcing Amazon’s dominance in retail.

Specifically, what Amazon calls its “fair pricing” policy means that the algorithm determining search results on its platform disfavors products that are sold for less anywhere else, and that the company may delist the products from sale entirely. Under the fair pricing policy, no product that is sold for less outside of Amazon’s platform will win the coveted “Buy Box,” an aspect of Amazon’s functionality that allows a consumer to automatically purchase an item after a search with one click, without considering alternative offers. According to one seller, losing the Buy Box means a 40 to 50 percent drop in sales in a single day. Even more harmfully, the listing for the disfavored product may no longer give a consumer the option to “add [the product] to cart” at all, instead directing the consumer to “see all buying options,” all of which are from other sellers. According to the policy, Amazon can even terminate “selling privileges” for the seller altogether, cutting off access to over a third of the domestic e-commerce market for a seller who offers consumers a lower price elsewhere.

Even when Amazon takes less drastic measures, when the company places products at a point in search results where consumers are less likely or unable to locate and purchase them, it punishes the products’ sellers if they do not raise their prices on competitor platforms if they also want to make sales on Amazon.

Research has shown that although these price parity policies can appear initially “benign,” because they “guarantee that the consumer will benefit from the lowest price on a good or service when using the platform,” the policies in fact “allow platforms to collect substantial merchant fees from sellers who need them to reach their unique consumers.” Price parity policies like Amazon’s “lead to higher platform fees, drive up retail prices, and discourage entry by firms with lower-cost business models.” Platform fees are the primary feature through which platforms compete, but potential challengers to Amazon cannot effectively recruit sellers by charging lower fees, because those lower fees cannot translate into lower prices, giving customers no reason to make the switch away from Amazon.

Amazon adopted its fair pricing policy only recently, after it claimed to have abandoned a policy with a different name but an identical impact amid scrutiny from European and domestic regulators. Historically, Amazon imposed explicit “most-favored nation” ("MFN") provisions in its contracts with third-party Marketplace sellers, which barred the sellers from offering their products for sale for less elsewhere. Amazon maintained these MFN provisions in contracts with European sellers until 2013, and in contracts with United States sellers until 2019.

Understandably, MFN provisions, in the context of platforms like Amazon, have raised concern under competition laws. In 2012, both the United Kingdom and Germany initiated proceedings against Amazon for its use of an MFN provision in seller contracts. The German competition authority, applying both German and European competition law, found that:

> [T]he Marketplace [seller agreement, specifically the MFN] constitutes a horizontal trade cooperation between Amazon and third-party sellers that has as its object and effect various restrictions of competition. The price parity clause is a hardcore restriction which
is not indispensable for Marketplace efficiencies and does not allow consumers a fair share of the resulting benefit.\textsuperscript{32}

Amazon’s MFN provision, the German agency found, “result[ed] in safeguarding Amazon’s large own-account share of sales as a competitor and the extensive reach of amazon.de, which cannot be attacked by competing platforms.”\textsuperscript{33}

Amazon removed the MFN provision from its contracts with European sellers in 2013, prompting European agencies to withdraw their formal proceedings, but Amazon maintained the provision in contracts with U.S. sellers for another six years. It removed the MFN clause from those contracts only after United States Senator Blumenthal (D-Conn) wrote to the FTC and the Department of Justice expressing “deep concerns” that the provision might “raise prices for consumers both in the short term and in the long run,” and might “work to block the emergence of more efficient online marketplaces.”\textsuperscript{34}

In the face of Germany’s adverse finding, the U.K. investigation, and criticism from a U.S. lawmaker, Amazon sought to appear as though it had abandoned its MFN provision in agreements with all Marketplace sellers by replacing it with the fair pricing policy.\textsuperscript{35} However, this fair pricing policy—which Amazon continues to enforce against U.S. sellers\textsuperscript{36}—is a thinly-veiled MFN restriction, and causes the same anti-competitive harm as the explicit MFN provision, preserving Amazon’s dominance and undercutting would-be competitors by preventing them from competing on price. In Petitioners’ view, the fair pricing policy is simply an MFN clause under a different name. Amazon’s market power allows it now to accomplish \textit{de facto} what it had previously accomplished \textit{de jure}.

2. Amazon Appears to Tie Favorable Search Rankings to its Own Profit and the Purchase of Unrelated Amazon Services

Although over a third of all domestic ecommerce sales take place on Amazon, not every product has an equal chance at selling. The vast majority of Amazon’s millions of sales are of products displayed prominently in search results; one study estimated that more than 80 percent of sales on Amazon are of products ranked first in search results, and another found that two-thirds of consumers do not even look at any products listed after the first page of search results.\textsuperscript{37} Given Amazon’s dominance in ecommerce, one journalist who studied search result data called advantageous display of a product on Amazon’s pages an “oft-decisive advantage” for the merchant offering that product for sale.\textsuperscript{38}

Amazon refuses to disclose the algorithm that determines search rankings and Buy Box placement, but evidence suggests that Amazon exploits its power over product display to induce adoption of paid services other than Marketplace listing fees and to indirectly enforce policies that have already raised antitrust concerns.\textsuperscript{39} The opacity of Amazon’s algorithm may mean that it benefits Amazon’s own products at the expense of Marketplace products sold by third parties, who must pay for premium services for the chance of being displayed in as advantageous a manner as that of Amazon’s own products. One group of researchers attempted to reverse-engineer the Amazon search algorithm and identified seven features that accurately predicted which product would earn the all-powerful Buy Box.\textsuperscript{40} Two of the potentially determinative factors the researchers identified were (i) whether Amazon was the retailer of the product, and (ii) whether the product was sold using Amazon’s logistics service,
Fulfillment by Amazon ("FBA"). Both of these factors directly benefit Amazon by virtue of its dual roles as marketplace and market participant.

a. Tying Favorable Search Rankings to the Purchase of Amazon Services

Amazon is using its dominance as a retail platform to give its vertical interests, like FBA, preferential treatment. One of the ways that Amazon leverages its dominance in one market to achieve dominance in an adjacent market is through the imposition of implicit tying arrangements on third-party sellers and vendors. Tying arrangements, in which one product is sold on the condition that the purchaser buys a different product, are either per se unlawful or analyzed under the rule of reason, based on their anti-competitive effects, and may violate both the Sherman and Clayton Acts. Unlawful tying provisions are characterized by “the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want or would have bought elsewhere on different terms.” This has the effect of excluding competing sellers of the tied product. In this context, Amazon’s competitors are not only the third-party sellers with whom Amazon competes as a retailer, but also the shippers and logistics providers who offer services to those third-party sellers. All of these entities serve as “intra-platform competitors.”

On a platform like Amazon’s, tying arrangements can reduce competition by disincentivizing switching from Amazon products to those offered by intra-platform competitors. Even if a competing product were free, users would likely not adopt it when the costs associated with its adoption on the platform outweigh the utility of the product. In this case, a third-party seller will pay a premium for Amazon’s shipping and logistics services, because using the services of an Amazon competitor—even if they were free—would come with a price too great to bear: demotion in search rankings.

The third-party seller’s fears of paying this price would not be speculative. Amazon admits that it favors products whose sellers pay for the company’s shipping and logistics service. Paying for FBA makes a third-party seller’s items eligible for free expedited shipping to members of Amazon’s Prime program. Prime members—who are the most affluent ecommerce shoppers—see Prime-eligible products first in search results, meaning that those customers with the most money to spend are highly likely to buy products from which Amazon directly profits, either as a retailer or logistics provider. A 2016 analysis found that FBA products and products sold by Amazon itself represented 94 percent of the listings that won the Buy Box without being the least expensive option. Beyond the Buy Box, when ranking products by cost, Amazon includes shipping price in the total cost of third-party items, but omits it in the total cost of Amazon first-party items and products sold by third parties paying Amazon for FBA service, even for consumers who would not benefit from free shipping through their Prime memberships. This policy artificially inflates the rank of those products and conceals their true cost.

These practices tie favorable display on Amazon to purchase of the FBA service, and undermine outside logistics services competing for third-party sellers’ business. Amazon argues that it favors FBA products because it can guarantee that they will “land on the doorstep quickly,” but Amazon does not currently grant the same treatment to products that may arrive quickly but are shipped with one- or two-day delivery services from Amazon’s competitors. In 2015, Amazon began offering “Seller Fulfilled Prime,” a program that the company claimed would allow sellers to “be part of the Prime program and ship their own orders at Prime speed directly,” without paying for FBA. One participant in Seller
Fulfilled Prime reported that complying with the program was “brutal”; when Amazon implemented a one-day Prime shipping standard, it became almost “impossible to continue.” Then, as of March 2019—four years after Amazon introduced the program—enrollment in Seller Fulfilled Prime was closed. Favorable display and Prime-eligible designation are now unavailable to new third-party sellers who wish to fulfill their own orders by patronizing Amazon competitors offering fulfillment services.

Amazon has even prevented those sellers who did qualify for Seller Fulfilled Prime while the program was open from patronizing Amazon’s competitors. During the 2019 holiday shopping season, for example, Amazon banned Fed Ex as a shipper for Seller Fulfilled Prime, illustrating its power over both the sellers and Amazon’s logistics competitors. A news report quoted a third-party seller consultant explaining the effects of the ban: “Some sellers exclusively use FedEx for Seller Fulfilled Prime...because they have negotiated good freight rates or have daily pickups....Not being able to use FedEx for SFP shipments will cause sellers who negotiated good FedEx ground rates to incur higher costs....”

Earlier, Amazon had banned sellers participating in Seller Fulfilled Prime from using U.S. Postal Service shipping unless the seller purchased the postage directly from Amazon. This allowed Amazon to engage in “postal arbitrage,” charging the sellers market rates while only paying USPS the lower bulk rate Amazon had negotiated. Amazon took a small profit on the arbitrage but according to a different consultant, sellers believed the company had a greater purpose: the policy constituted “a tooth and nail effort to drive the merchant into an FBA relationship” by making it “so difficult for the merchant to do business outside of the [Amazon] ecosystem that it would effectively let Amazon manage all of its fulfillment and delivery.”

Amazon has demonstrated its power in the logistics market by disfavoring competitors, limiting options for sellers, and allegedly driving up prices for consumers. Now, the only way that third-party sellers not already enrolled in Seller Fulfilled Prime can obtain favorable search rankings for “land[ing] on the doorstep quickly” is if they also pay FBA fees. Evidence shows that third-party sellers have responded to Amazon’s apparent tie and flocked to FBA. Almost two-thirds of Marketplace third-party sellers use FBA, and Amazon reported that the number of active sellers using FBA grew more than 70 percent in 2016. Experts estimate that about 75 percent of Amazon’s $43.7 billion in third-party seller fees represent fees charged for logistics services.

By imposing this type of tying arrangement, Amazon is using its market power “to force a purchaser to do something that he would not do in a competitive market.” Amazon’s tying can hamstring sellers, who effectively have no option but to choose Amazon even if there are preferable competing services. The tying arrangement also harms competition in the markets for products that might complement Amazon’s ecommerce platform, because other firms cannot offer the advantageous platform placement that Amazon can and therefore cannot effectively compete with it.

b. Using Profit as a Factor in Favorable Search Rankings

Recent reports indicate that Amazon is not only tying favorable search rankings to services from which it profits, but that it is considering profit margin directly as an independent factor in search results themselves. Amazon engineers and former executives, speaking on the condition of anonymity, have reported that Amazon has incorporated profitability into the algorithm that determines search
Former Amazon employees who worked on that project told journalists that they had opposed the change to the algorithm; one said “[t]he search engine should look for relevant items, not for more profitable ones.”

Amazon reportedly proceeded with the change despite this pushback. This shift resulted in a search function that no longer directs consumers to the best or even cheapest products in response to their searches. Instead, Amazon prominently displays products that offer the company higher profit or higher profit margins—whether because the products belong to Amazon’s many private labels, belong to brands of which Amazon is the exclusive retailer, or are otherwise lucrative—than alternative products that also match the search query. The company presents these products to consumers in apparently objective search results. In so doing, Amazon uses its role as a platform to undermine the millions of third-party sellers who serve as its retail competitors but who do not patronize its unrelated fulfillment or advertising services.

Amazon’s self-preferential treatment has become increasingly well-documented over time. In 2016, journalists who looked “at 250 frequently purchased products over several weeks” discovered that the Buy Box was awarded to Amazon’s “own products and those of companies that pay for its services... even when there were substantially cheaper offers available from others.” By 2018, Amazon had changed the default search sorting option to “featured,” which indicates higher rankings for favored products like those identified by the journalists in 2016, and eliminated the option for consumers to sort by the more objective “relevance” metric, which had been the default sorting option for years.

In 2019, media outlets reported that before an Amazon user could purchase a product that competed with one offered by an Amazon private or exclusive label, Amazon pushed the consumer to consider or even affirmatively reject a competing Amazon product. On Amazon’s mobile app, a pop-up advertisement appeared, obscuring the competing non-Amazon product and “forcing customers to either click through to the lower-cost Amazon products or dismiss them before continuing to shop.” One third-party seller of nutritional supplements that were targeted by the pop-up ads called them “sneaky,” but said that selling on the platform required “having a stomach of steel and taking whatever they throw at us.” Amazon had been the source of $10 million of that third-party’s sales in the previous year, representing 85 percent of its entire business.

Several months later, Amazon deployed a similar tactic on its web-based platform. There, an advertisement prompted consumers to consider competing Amazon private label products “at exactly the moment the customer is ready to buy” a non-Amazon product. In a Washington Post study, no products belonging to non-Amazon brands received the same prompts, even if they were competing with the primary product and sold for less. Amazon’s practices of redirection are an abuse of its platform power, disadvantaging the third-party sellers who depend on Amazon for a chance at over a third of all ecommerce sales, and stifling competition by interfering with consumer access to what may be the objectively best products for them.
3. Amazon Charges Users of Competing Platforms More for Fulfillment Services that it Charges Users of its Own Platform

Amazon also uses improper tactics to compete against eBay and other platforms by disfavoring sellers who use Amazon delivery services to facilitate sales made on non-Amazon platforms. Amazon offers FBA not only to third-party Marketplace sellers, but to any seller who needs its storage, logistics, and delivery functions. In that context, these services are branded as Multi-Channel Fulfillment ("MCF"). However, Amazon charges sellers more for fulfillment services when they are used for an order placed on a competing website instead of on Amazon.com.

Amazon ostensibly competes with traditional logistics providers for third-party seller customers, but not with lower prices. A third party will pay between $0.48 and $2.40 to store its products with Amazon, but only $0.19 to store them with FedEx. Despite this apparently uncompetitive pricing, FBA has grown significantly. A freight industry journal explained how the growth of the Amazon Prime program has fueled Amazon’s fulfillment service: “FBA is expensive but retailers are forced to use it to reach buyers... Customers pay for Amazon Prime, and no longer want to pay retailers to ship products to their homes. As a result, FBA, whatever the cost, becomes inevitable as the only really viable way to sell to Prime subscribers.”

That cost can be significant. A third-party seller will pay 150 percent more to use Amazon fulfillment to sell a t-shirt on eBay’s platform than it would if it were selling on Amazon, for example. After reports surfaced about its price discrimination, Amazon removed the FBA price comparison from its page promoting MCF, where it publishes fees charged to sellers on competing platforms, but it has not changed the underlying cost structure. As of February 2020, Amazon charges sellers $3.81 to fulfill an order for a t-shirt when the order is placed on Amazon, and $5.90 to fulfill an order for a t-shirt when the order is placed on a competing platform like eBay. Amazon’s vertical expansion into the general logistics market, beyond simply providing complementary services for its own third-party sellers, has created a conflict of interest which incentivizes the company to discriminate against competitor platforms.

The terms of Amazon’s contracts with third-party sellers also have the potential to undercut potential logistics competitors. Recently, eBay announced plans to offer its own fulfillment services beginning in 2020, using discounts negotiated with logistics providers. If Amazon enforces its rules for sellers as they are currently written, however, it will prohibit sellers on its platform from using eBay’s fulfillment services. Amazon’s rules bar sellers from “divert[ing] Amazon customers to another website,” and from using any “external packaging, or other information identifying a third-party drop shipper.” Amazon even tells sellers to “avoid...[i]ncluding website URLs in product feeds, business name, or other company information that might refer customers to your website or a third-party website.” If Amazon responds in the same way to eBay-branded packaging and bans it, it would exacerbate the impact of its tying arrangement and—because of its command of the market for third-party sellers—damage eBay’s ability to compete as a provider of logistics services for Amazon’s millions of third-party sellers.
4. Amazon May Use Data Obtained as an Ecommerce Platform to its Competitive Advantage as a Retailer of Consumer Goods

Amazon also uses its access to data on all Marketplace sales to benefit itself as a platform and as a Marketplace retailer. Amazon sells products through more than a hundred different private-label brands, and is the exclusive retailer of more than 600 other brands. Repeated anecdotal accounts, reported widely in the media, suggest that Amazon has used its access to third-party seller data to inform its internal product development and manipulated search results to increase private-label and other high-profit margin sales. Amazon’s private-label products are “designed to be more profitable than competing items,” because the products can capitalize for free on marketing by name brands. Amazon can also use its access to data about successful products by choosing to source those products directly from their manufacturers, cutting third-party sellers out of profitable retail spaces and disincentivizing innovation by profit-squeezed manufacturers.

Researchers have found examples suggesting that Amazon’s entry as a first-party seller, whether through its private labels or direct-sourcing, is informed by data obtained from third-party sellers. Third-party sellers are Amazon’s “complementors;” complementors build their businesses on platforms and sell their products or services to platform users. They complement Amazon’s platform by making it more valuable to users and therefore, to Amazon. In the aggregate, complementors are essential to Amazon’s ecosystem—even at its enormous size, Amazon is practically unable to retail each of the hundreds of millions of products sold on the Marketplace. Complementors also assume the risk of carrying niche and fad products in their inventory, and can introduce new products based on particular insight that Amazon lacks. Complementors attract customers that Amazon might not. Amazon’s Marketplace is, for this reason, one of the most valuable components of Amazon. However, any given individual complementor is disposable; once the complementor introduces new products or otherwise contributes to Amazon’s growth, Amazon will continue to benefit from the business of the customers whom the complementor attracted to its platform even if Amazon drives that complementor out of business.

Recently, in the first large-scale empirical study of the competitive pressures complementors experience on the Amazon Marketplace, researchers quantified the anti-competitive effects of Amazon’s data exploitation. Beginning in 2013, they identified thousands of products offered by third-party sellers, and later checked whether Amazon had chosen to offer the same products as a first-party seller. Over a ten-month period, Amazon entered 3 percent of its third-party seller’s “product spaces,” and did so when products had “higher sales and better reviews and...do not use Amazon’s fulfillment service,” meaning that damaging the seller’s business would not have an adverse impact on Amazon’s fulfillment revenue. The researchers found that Amazon’s entry was neither random nor independently informed by conditions outside the Marketplace.

Amazon begins selling products even when there is healthy competition between third-party sellers in the preexisting market. Amazon, of course, does not need to play by the same rules that would apply in a competitive market. Amazon can outmaneuver the competition by, for example, “presenting itself as the default seller even when the same product is offered at a lower cost...with a comparable shipping speed by third-party sellers with high ratings.” As a consequence of Amazon’s entry, third-
party sellers are more likely to withdraw from selling the products Amazon has mimicked. In contrast to competition among third-party sellers, which did not decrease entry into the market, “competing with Amazon on its website under its rules” made third-party sellers more likely than other sellers to withdraw from the Marketplace, limiting consumer choice and further cementing Amazon’s dominance.89

The researchers who documented Amazon’s strategy of entering profitable product markets proposed certain tactics that third-party sellers can employ to blunt Amazon’s anti-competitive force, but these tactics are forestalled by the one-sided contract terms Amazon imposes on the sellers. The researchers suggest, for example, that third-party sellers “can initiate impediments to...procurement by platform owners” by “concealing supplier information, [or] seeking exclusive contracts with manufactures as sole suppliers.”90

Neither of those tactics will help third-party sellers on Amazon’s platform facing competition from Amazon. The company maintains a policy applicable to brands acting as third-party sellers that provides that if Amazon “choose[s] to source [a brand’s] products” directly, then “the [b]rand may not also sell those products as a seller in the Amazon store,” and Amazon will become the only retailer of the product on its platform.91 As of late 2018, Amazon expanded this policy to prohibit brands’ “agents, licensees, and other representatives selling on their behalf” from offering the brands’ products in the Amazon Marketplace if Amazon decides to source and retail them directly.92 This allows Amazon to maintain near-total control over products it identifies as popular and high-profit. When Amazon uses this control to set a product’s price below those of other retailers, it eliminates other retailers as competitors for the product’s sales. In the process, it reinforces the brand’s reliance on Amazon as a platform and retailer, and Amazon’s control over the brand.

A former Amazon product manager confirmed the researchers’ findings, explaining that “not only can Amazon track what shoppers are buying; it can also tell what merchandise they’re searching for but can’t find,” and then, she said, “Amazon can just make it themselves.”93 Even when shoppers can find what they are looking for, however, Amazon may have already appropriated the product’s concept and design and started retailing a competing item. “All Amazon had to do was pick the best one and copy it,” the manager said.94 In one example, Amazon introduced a laptop stand that was indistinguishable from the very popular stand that a third-party seller, Rain Design, had been selling on the Marketplace for ten years. The primary distinction between the two products was price: the Amazon Basics-branded stand was $19, compared to Rain’s $43 stand.95

More recently, Amazon began selling wool sneakers that “bear a striking resemblance” to popular gray-and-white sneakers made by the brand Allbirds, which is carbon neutral and uses wool that “ethically and sustainably farmed.”96 Amazon’s version of the shoes costs $35, compared to the Allbirds price of $95, and makes no claim to being sustainably manufactured. In 2018, Amazon had captured 55 percent of all online shoe sales,97 and Allbirds’ CEO emphasized that Amazon’s market share made its version more of a threat than other “knockoffs.” Nonetheless, he said that the company was unlikely to sue Amazon because Allbirds was “a company of about 500 people total,” and he suspected that “Amazon has more than double that in just lawyers.”98 In October 2018, Allbirds’ valuation was $1.4
Amazon’s power is such that it can effectively silence even one of Silicon Valley’s highly-valued “unicorns.”

B. The FTC Should Investigate Whether Amazon Abuses its Dominance in Cloud Computing

Amazon’s cloud computing business is fourteen years old, and its AWS Marketplace has existed only since 2012. In 2016, CEO Jeff Bezos celebrated the fact that “AWS is bigger than Amazon.com was at 10 years old, growing at a faster rate, and — most noteworthy in my view — the pace of innovation continues to accelerate.” Similarly to Amazon’s ecommerce Marketplace, the company operates an AWS Marketplace on which third-party sellers can retail software, data, and related products for use on the AWS cloud. As of January 8, 2020, there were 7,240 products on the AWS Marketplace from approximately 1,659 third-party AWS sellers. Sellers on the AWS Marketplace may be either independent software vendors that develop their own software and services, or authorized software resellers.

Amazon’s cloud computing business has grown using some of the same anti-competitive tactics that make the company so dominant in ecommerce. As Amazon continues to expand into logistics, grocery, and other markets, it will have more opportunities to leverage its dominant market position into dominance in unrelated markets using the anti-competitive tactics it has deployed in ecommerce and cloud computing.

1. Amazon Controls Prices on its Cloud Computing Software Platform through Most-Favored-Nation Restrictions

AWS requires sellers to agree to a most-favored-nation clause, which expressly bars them from selling their products at lower prices on competing platforms or on the seller’s own website. This is the same requirement that Amazon abandoned in its contracts with third-party ecommerce sellers after the U.K. and Germany concluded that the presence of such a clause in the contracts “constitute[d] a horizontal trade cooperation...that has as its object and effect various restrictions of competition.” The German competition authority found that the provision was a hardcore restriction of competition that lacked redeeming consumer benefits. The same analysis is applicable here.

Because Amazon is dominant in cloud computing and because its AWS Marketplace is likely the single-largest platform for purveyors of software, data, and related services to market their products, the AWS MFN provision warrants scrutiny. MFNs violate the Sherman Act when they unreasonably restrain trade and reinforce dominance. The AWS MFN provision appears to deny competing platforms and even the developers themselves the opportunity to offer lower prices to smaller sets of consumers than those purchasing the software products on the AWS Marketplace. While it may make financial sense to offer discounts to the small number of users on a new sales platform, it might be ruinous to do so to thousands of customers on the AWS Marketplace. The MFN provision therefore prevents would-be rivals to the AWS Marketplace from becoming “competitive constraints,” whether by offering better prices for buyers or more favorable terms for sellers. With this contract term, Amazon deters entry into the software platform market by potential competitors and reinforces AWS’s dominance with no apparent redeeming benefit for consumers.
2. Amazon, as a Cloud Computing Software Retailer, Has the Power to Manipulate Search Rankings on its Cloud Computing Software Platform to Harm its Competitors

Amazon appears to exploit its dual roles as retailer of consumer goods and platform in its ecommerce business. A similar strategy appears in its cloud computing business, where it plays dual roles as retailer of software and as platform. Much of the software offered through the AWS Marketplace is open source, meaning that it can be freely accessed, used, changed and shared by anyone. AWS has been accused of competing with AWS Marketplace sellers by creating AWS software that imitates their products. The most obvious and egregious examples of this behavior include cases when AWS has taken open source projects and repackaged them as proprietary AWS services. This practice of “strip mining”—stripping code without contributing to the open source product—does not violate the licensing terms of the open source software and therefore likely does not violate competition law.

However, once Amazon has become a competitor to an open source product, it has to power to disfavor the open source product in search results for AWS Marketplace products, introducing friction to the purchasing process and inducing customers to select products from Amazon or other competitors to the open source product. This is analogous to the self-preferencing power that Amazon uses to its benefit on its ecommerce platform. One inexplicable search result may illustrate this power. In 2019, Amazon launched “Amazon DocumentDB (with MongoDB compatibility).” The program is supposed to be an alternative to MongoDB Atlas, document management software released under an open source license. DocumentDB does not use the original open source code developed by MongoDB, but it emulates MongoDB’s operation and allows code written for MongoDB to work on DocumentDB.

AWS does not act as a first party on its AWS Marketplace because customers must purchase AWS services through a dedicated interface, so a search for “MongoDB” does not return an Amazon product as the first result. However, it does not return a MongoDB product as the first result, either. Instead, MongoDB’s product is displayed second in the search results, after a version of its products packaged by an unrelated competitor named Bitnami. Moreover, the number of reviews, which can serve as a proxy for sales volume and product popularity—both of which would be legitimate and unsurprising factors in search result rankings—suggests that the product sold by MongoDB is more popular than Bitnami’s package, which has no reviews at all. MongoDB’s search results raise questions about what inputs Amazon weighs most heavily in its AWS Marketplace search algorithm, given that “MongoDB” is both in the name of the product and the name of seller.

In the absence of disclosure from Amazon, the integrity of its AWS Marketplace search results is as questionable as the integrity of its retail Marketplace search results, which reports indicate are informed by profit. In the AWS Marketplace, Amazon may be relying on search algorithm inputs that indirectly benefit AWS by disadvantaging its competitors, enabled by the company’s dual role as platform and retailer.

C. The FTC Should Investigate Whether Amazon Depresses Wages by Locating in Concentrated Labor Markets & Squeezing its Fissured Work Force

Amazon’s business practices have significant, often negative impacts on labor markets, both for Amazon’s direct employees and for employees of its economically-dependent contractors. At the same time as the company consolidates control over competition, it consolidates control over local labor
markets. Amazon has the power to assert this control as a direct employer of hundreds of thousands of low-wage workers, and by indirectly setting a ceiling on earnings of independent contractors and contractor employees that allow Amazon to make good on its promises of rapid delivery.

1. Amazon Indirectly Sets Wages for its Fissured Workforce

Amazon is already one of the world’s biggest logistics companies, with offerings like trucking and ocean freight that go beyond its FBA service. In the case of outbound shipping, or last-mile delivery, Amazon has significantly lessened its dependence on large delivery companies and the U.S. Postal Service by developing its own vertically-integrated logistics network. Amazon’s network is the second largest in the private sector, but much of its operations are conducted by small businesses and nominal independent contractors whose viability depends on maintaining Amazon as a customer.

Amazon actively encourages its employees to quit their jobs and assume roles as independent contractors. Amazon induces small delivery businesses and individuals to act as independent contractors through firm initiatives such as the “Amazon Flex” and “Delivery Service Partner” programs. The company boasts that, through the Delivery Service Partner incentive, it has created at least 200 new Amazon-affiliated delivery firms in the past year. These approximately 800 small, independent contractors are now responsible for around 48 percent of Amazon’s last mile deliveries.

By virtue of its size and power as a buyer of delivery services, Amazon can impose monopsonistic restraints on the treatment of workers within its supply chain while, at the same time, avoiding legal responsibility for their fair treatment. As one investigation notes, Amazon’s model allows it to “shed[] costs and liability...By contracting instead with third-party companies, which in turn employ drivers, Amazon divorces itself from the people delivering its packages.” It effects this fissuring at the same time as it exerts near-total control over the way in which its deliveries are made. This includes dictating what contractor employees wear, what they drive, and how many packages they are compelled to deliver, all for a flat fee to the contractor.

Smaller providers, such as those whom Amazon induces to enter the market, are more likely to be economically dependent on Amazon than are larger delivery companies; research suggests that many are in fact reliant on Amazon for 100 percent of their business. This economic dependency increases the likelihood that providers will submit to Amazon’s prices and other terms. Amazon sets fixed fees for small delivery providers. Pursuant to one contract, Amazon paid small delivery providers $279.50 per day for a route in San Francisco. This figure covers the costs of overhead including the delivery vehicle, insurance, and the driver’s wages. If Amazon expected contractor drivers to deliver 250 packages, as has been reported, it was paying them a little over a dollar per package.

Amazon’s fragmentation of its supply chain erects a façade: the company appears to set route fees, not wages. In reality, however, these fees are tantamount to wages. Fixed overhead costs mean that the labor costs of an economically-dependent provider will be the most vulnerable to suppression given Amazon’s terms. Amazon can, furthermore, exert significant influence over these fixed costs, and by extension the resulting amount left over from its route fees for wages. In many cases, for example, Amazon generates revenue for itself by leasing vehicles from its own inventory to independent contractors.
As with its third-party seller complementors in ecommerce, Amazon shifts risk to and extracts fees from these small delivery providers who, in the aggregate, are indispensable to the company’s logistics operation but whose individual survival is irrelevant to it. Amazon divests itself of legal responsibility for its indirect workforce’s wages and working conditions while imposing stringent operating requirements on small providers that have a major impact on labor costs. Providers often have no choice but to accept Amazon’s terms and their wage implications in order to hold onto a slice of the delivery activities that Amazon’s dominant market share generates.

2. Amazon May Depress Wages in Concentrated Labor Markets

Amazon’s expansion has also been fueled by workers it employs directly. Amazon’s size as an employer has, like its other activities, grown at an historic rate. In 2016, Amazon became the U.S. company to reach a global workforce of 300,000 most quickly. This figure, which does not account for its subcontracted workforce and contractor employees, represents an average annual employment growth rate of approximately 30 percent during Amazon’s first 20 years of operation. Amazon has since undertaken further recruitment drives and acquisitions to the extent that, as of 2019, it is one of the largest employers in the U.S. with a direct workforce of approximately 400,000.

Excluding seasonal workers, Amazon directly employs 22 percent of the entire national labor market in private warehousing and storage. Amazon’s dominance in this labor market is even more overwhelming in many localities. Change to Win conducted a short survey of locations where Amazon directly employs a significant percentage of workers in the warehousing and storage industry and, based on evidence from the Bureau of Labor Statistics and other publicly-available sources, identified a number of local labor markets where average wages in the industry fell after Amazon’s arrival.

For example, with approximately 17,500 directly employed full-time workers across multiple warehouses, Amazon is New Jersey’s fifth largest employer. The company opened its largest New Jersey fulfillment center in Mercer County in June 2014. This site currently employs an estimated 3,500 workers. Petitioners estimate that excluding seasonal workers, Amazon’s share of the state and Mercer County labor markets for warehousing and storage is 30 percent and 51 percent, respectively. Mercer County’s annual salary and weekly earnings averages in warehousing and storage have both fallen by 18 percent since the year of Amazon’s arrival. A $45,699 average annual salary for warehouse work in 2014 had fallen to $37,546 by 2018. This was not part of a pre-existing trend. Prior to Amazon’s penetration of this local labor market, wages in warehousing and storage had risen for three consecutive years at both the county and state levels.

Amazon is also one of the largest direct employers in Lexington County, South Carolina and the county’s largest source of warehousing and storage employment. In 2017, the year of the most recently available local data, Petitioners estimate that Amazon’s share of the county labor market for warehousing and storage was 55 percent. After Amazon opened a fulfillment center in Lexington County in October 2011, the annual salary and weekly earnings averages for warehousing and storage work in the county both fell by 21 percent.

The story is the same in Chesterfield County, Virginia. Petitioners estimate that in 2018, Amazon’s share of warehousing and storage employment in Virginia’s labor market was approximately
37 percent,\textsuperscript{140} while its share of Chesterfield County’s warehousing and storage employment was approximately 48 percent.\textsuperscript{141} Since Amazon opened a fulfillment center in Chesterfield County in October 2012, the annual salary and weekly earnings averages for warehousing and storage work in the county have fallen by 21 percent—just as they did in Lexington County.\textsuperscript{142}

Petitioners believe that Amazon’s establishment of warehouses in concentrated labor markets where it can easily drive down wages for warehousing and storage labor is not an accident, but is rather by design. Amazon leases more of its warehouses from Prologis, a corporate real estate developer, than from any other landlord.\textsuperscript{143} Prologis assists clients like Amazon with locating their warehouses strategically, not only in a manner that is most efficient for logistics operations, but in a manner that allows them to take advantage of vulnerable workers and weak local economies. For instance, one Prologis site selection document identifies a high unemployment rate and low local median income as being the “labor advantages” of one site’s location outside of Atlanta, where Amazon also has a warehouse.\textsuperscript{144} In another Prologis document, the “labor advantages” for a second area where Amazon has a facility are presented as a “combination of low wages...in a non-union environment.”\textsuperscript{145}

These site selection preferences raise the prospect that when Amazon does act as a direct employer, it may knowingly distance its warehouses from tighter local labor markets with higher wage expectations and place them instead in looser labor markets where workers are more likely to accept suppressed pay rates because of a paucity of options. This strategy would allow Amazon to depress wages and exploit workers, particularly ones who lack union representation, and it compels serious examination of the anti-competitive nature of Amazon’s employment practices.

V. As Amazon Grows, Questions Accumulate

In the twenty-five years of Amazon’s existence, many domestic and foreign investigations into the company’s anticompetitive practices have opened and closed without apparent effect on its path to consolidation and dominance of ecommerce, cloud computing, and beyond. Despite the efforts of authorities representing the United States, Austria, Germany, Great Britain, India, Italy, Japan, Spain, and the European Commission to police Amazon, regulators continue to struggle to understand the company’s business practices and their effect on competition. In August 2019, for example, United States Senators Blumenthal (D-Conn) and Menendez (D-NJ) asked Amazon to explain how it designates certain products as “Amazon’s choice,” which leads to a 30 percent increase in sales. Amazon offered an unsatisfying response, which Senator Menendez said “left [him] with more questions than answers....”\textsuperscript{146}

The House of Representatives is also probing how Amazon competes. In June and July 2019, the House Subcommittee on Antitrust, Commercial, and Administrative Law held oversight hearings as part of a broader investigation into competition in digital markets. Amazon associate general counsel Nate Sutton testified on Amazon’s behalf. Committee Chair David Cicilline (D-RI) did not find Sutton’s answers satisfactory, and wrote to Amazon after the hearing, explaining that he was “troubled by Mr. Sutton’s responses to questions by Members of the Subcommittee. In several instances, Mr. Sutton responded... by offering either ancillary information or partial and selective responses.”\textsuperscript{147} Amazon replied to Cicilline in writing, but continued its attorney’s pattern of nonresponsive answers. In response to the
Subcommittee’s query about the number of “Prime members in the United States,” for example, Amazon offered only that “Prime has over 100 million paid members worldwide.”

Petitioners support the FTC’s own reported effort to obtain voluntary third-party cooperation in an initial inquiry into Amazon, but we do not believe it is sufficient. Given the speed at which Amazon continues to amass market power and the company’s persistent disregard for the inquiries of the legislative branch, we submit that a more forceful inquiry is urgently needed. In the absence of compelled disclosures, antitrust regulators will continue piecing together narratives of anticompetitive conduct like those briefed herein without gaining enough traction and contemporaneous understanding of Amazon’s operations to determine whether it is suppressing competition unlawfully, or to regulate it preemptively. It is imperative that the FTC call on Amazon to answer the charge that it is using exclusionary conduct to the detriment of workers, consumers, merchants, and competition itself.

Respectfully submitted,

International Brotherhood of Teamsters

Communications Workers of America

United Food and Commercial Workers International Union

Service Employees International Union

Change to Win

February 27, 2020


Id. at § 46(a).

Id. § 46(f).


Michael J. Coren, There’s precedent for Amazon competing with so many companies. It doesn’t end well, Quartz (Oct. 28, 2017), available at https://qz.com/1107328/theres-precedent-for-amazon-competing-with-so-many-companies-it-doesnt-end-well/.


Sammy Nickalls, Infographic: Over Half of Consumers Start Their Online Shopping on Amazon, AD WEEK (Jun. 2, 2019), available at https://www.adweek.com/brand-marketing/infographic-over-half-of-consumers-start-their-online-shopping-on-amazon/; Jason Del Rey, 55 Percent of Online Shoppers Start Their Product Searches on


26 Id.


33 Id. at 3.

35 Guadalupe Gonzalez, You’re No Longer Required to Sell Products for Less on Amazon. The Problem? If You Don’t, You’ve Got Another Penalty Coming, INC. (Mar. 13, 2019), available at https://www.inc.com/guadalupe-gonzalez/amazon-removes-price-parity-not-fair-price-rule-third-party-sellers-antitrust-violations.html. Amazon retains the right to amend its seller agreements at any time with little or no notice. It did this, for example, when it inserted mandatory arbitration clauses into all of its seller agreements, depriving those sellers of the right to petition in public court for redress of antitrust violations, among others. Amazon was involved in 163 arbitration agreements with its third-party sellers from 2014 to 2019, fewer than 30 cases per year for 2.5 million sellers. Amazon Responses to Cicilline Questions, supra note 25.


39 During its attack on book publishers, for example, Amazon reportedly tweaked algorithms determining the rank of the publishers’ books as a reminder of the platform’s power to effectively eliminate the products from a consumer’s view. Separation of Platforms & Commerce, supra note 37.


41 Id.


45 Id. at n.14. (“[W]hether or not exclusion occurs depends on the degree of intra-platform switching costs induced by the platform design.”).

46 “Suggesting the lowest price item that many not land on the doorstep quickly isn’t being customer centric.” Statement to ProPublica, AMAZON.COM, INC. (2016), available at https://www.documentcloud.org/documents/3111034-Amazon-Statement.html.


48 Amazon Says It Puts Customers First, supra note 38.

49 Id.

50 Amazon Statement to ProPublica, supra note 46.

51 Amazon 2015 Shareholder Letter.


Amazon Changed Search Algorithm, supra note 37.

Amazon Sayed It Puts Customers First, supra note 38.

Amazon Changed Search Algorithm, supra note 37.


Amazon Changed Search Algorithm, supra note 37.


78 TJIAmazon Brand Database, TJIAMazon RESEARCH, https://this.just.in/amazon-brand-database/. As of November 7, 2019, this database had identified 146 private label brands and 640 brands for which Amazon is the exclusive retailer.
80 Amazon Changed Search Algorithm, supra note 37.
82 Id. at 2.
84 See 2018 Letter to Shareholders, supra note 17.
85 Competing with Complementors, supra note 81.
86 Id. at 4, 8.
87 Id. at 17, 25-26.
88 Id. at 27.
89 Id. at 20, 27.
90 Id. at 28.
92 An Amazon Revolt, id.; Standards for Brands, supra note 91.
94 Jeff Bezos v the World, id.
98 Kevin Stankiewicz, Allbirds Co-CEO: Suing Amazon Over Shoe ‘Risky’ — They Have More Lawyers Than We Have Workers, CNBC (Sept. 25, 2019), available at https://www.cnbc.com/2019/09/25/allbirds-co-ceo-jp-zwillinger-suing-amazon-over-shoes-is-risky.html. The CEO was close to correct. In 2017, Amazon had an 800-person in-house legal department, and the company has been hiring aggressively in the two years since. Inside Amazon’s Legal Department with GC David Zapolsky, LAW.COM (Aug. 2, 2017), available at https://www.law.com/insidecounsel/almid/5982104f140ba0f55203ae89/?sreturn=20190825144343.
100 “Unicorns” are privately-held startups valued at more than $1 billion. Id.
102 See AWS Marketplace Search Results, “All Categories,” https://aws.amazon.com/marketplace/search (last accessed Jan. 8, 2020); AWS Marketplace makes it easier for you to discover relevant third-party software and data

103 Terms and Conditions for AWS Marketplace Sellers, Sec. 3.6 (Nov. 27, 2019) (“You must offer Your Marketplace Content to Subscribers on terms and conditions (including but not limited to price) at least as favorable to the same offering(s) on Similar Sales Channels.”).

104 Case Report: Amazon Removes Price Parity Obligation, supra note 32.


106 See Antitrust Enforcement against Platform MFNs, supra note 30 at 2080.


110 It may violate intellectual property and consumer protection laws. See Elasticsearch, Inc. v. Amazon.com, Inc., N.D. Cal. Case No. 19-cv-06158 (alleging trademark infringement and false advertising).


115 A number of Amazon’s tens of thousands of purported “independent contractors” who operate through the Amazon Flex program contend that they are in fact employees and have been misclassified. See Rittman et al. v. Amazon.com, Inc., et al., W.D. Wash. Case No. 16-cv-1554, Dkt. No. 115 (Order Denying Defendant’s Motion to Compel Arbitration).


120 Id.

121 Id.

122 Id.


134 Id.; *Average Annual Pay in Private NAICS 493 Warehousing and storage in New Jersey – Statewide*, Quarterly Census of Employment and Wages, BUREAU OF LABOR STATISTICS (last accessed October 11, 2019).


137 Terry Ward, *As Amazon grows, so will Lexington County workforce*, BURLINGTON CTY. TIMES (Feb. 6, 2017), available at https://www.coladaily.com/communities/cayce/archive/as-amazon-grows-so-will-lexington-county-workforce/article_511c5015-b10b-5743-921a-fd64c31c80b7.htm; *All Employees in Private NAICS 493 Warehousing and storage for All establishment sizes in Lexington County, South Carolina*, Quarterly Census of Employment and Wages, BUREAU OF LABOR STATISTICS (last accessed Dec. 6, 2019).


Average Annual Pay in Private NAICS 493 Warehousing and storage & Average Weekly Wage in Private NAICS 493 Warehousing and storage in Chesterfield County, Virginia, Quarterly Census of Employment and Wages, BUREAU OF LABOR STATISTICS (last accessed Oct. 11, 2019).


Prologis Orchard Hills, Prologis, available at https://listingsprod.blob.core.windows.net/ourlistings-usa/7807d586-fa5f-4eac-9044-6a462d2d66f1/1a84c6eb-68a3-48c3-8daa-d63b41b12853.


Petitioners

Founded in 1903, the International Brotherhood of Teamsters represents 1.4 million hardworking men and women throughout the United States, Canada and Puerto Rico. Visit www.teamster.org for more information. Follow us on Twitter @Teamsters and “like” us on Facebook at www.facebook.com/teamsters.

The Communications Workers of America represents working people in telecommunications, customer service, media, airlines, health care, public service and education, manufacturing, and other industries.

The United Food and Commercial Workers International Union is the largest private sector union in the United States, representing 1.3 million professionals and their families in grocery stores, meatpacking, food processing, retail shops and other industries. Our members serve our communities in all 50 states, Canada and Puerto Rico. Learn more about the UFCW at www.ufcw.org.

Service Employees International Union unites 2 million diverse members in the United States, Canada, and Puerto Rico. SEIU members working in the healthcare industry, in the public sector, and in property services believe in the power of joining together on the job to win higher wages and benefits and to create better communities while fighting for a more just society and an economy that works for all, not just corporations and the wealthy.

Change to Win is a democratic federation of labor unions representing over 4 million working people in the United States and Canada across a wide range of industries, including retail, manufacturing, healthcare, public service, banking and transportation. Change to Win and its union affiliates have engaged the Federal Trade Commission on a number of issues, including fair competition in the franchise industry and the pharmacy benefit manager sector, toward its goal of eliminating anticompetitive and abusive business practices that harm both workers and consumers.
In its decision of 6 February 2019 the Bundeskartellamt prohibited Facebook Inc., Menlo Park, USA, Facebook Ireland Ltd., Dublin, Ireland, and Facebook Germany GmbH, Hamburg, Germany (hereinafter: “Facebook”) from making the use of the Facebook social network (hereinafter: “Facebook.com”) by private users residing in Germany, who also use its corporate services WhatsApp, Oculus, Masquerade and Instagram, conditional on the collection of user and device-related data by Facebook and combining that information with the Facebook.com user accounts without the users’ consent. The prohibition is based on Section 19(1) of the German Competition Act (GWB). The same applies to terms making the private use of Facebook.com conditional on Facebook being able to combine information saved on the “Facebook account” without the users’ consent with information collected on websites visited or third-party mobile apps used via programming interfaces (“Facebook Business Tools”) and use this data. There is no effective consent to the users’ information being collected if their consent is a prerequisite for using the Facebook.com service in the first place.

The proceeding was initiated in March 2016 and aimed at user and device-related data which Facebook collects when other corporate services or third-party websites and apps are used and which it then combined with user data from the social network. The proceeding did not deal with the issue of information processed on the use of the social network that is generated after users have registered. The Bundeskartellamt saw no reason to intervene on the grounds of the prohibition of abusive practices under competition law. It is taken into account that an advertising-funded social network generally needs to process a large amount of personal data. However, the Bundeskartellamt holds that the efficiencies in a business model based on personalised advertising do not outweigh the interests of the users when it comes to processing data from sources outside of the social network. This applies in particular where users have insufficient control over the processing of their data and its allocation to their Facebook accounts. As far as this part of data processing is concerned, it was necessary to intervene from a competition law
perspective because the data protection boundaries set forth in the GDPR were clearly overstepped, also in view of Facebook’s dominant position.

1. **Statement of facts**

Facebook develops and operates various digital products, online services and applications for smartphones (apps). Facebook's core product is the social network Facebook.com, which has been offered in Germany since 2008. Its user base has been increasing continuously worldwide. In 2018 the number of daily active users in Germany was 23 million, while 32 million users were classified as monthly active users.

Private users can access Facebook.com via the websites www.facebook.com, www.facebook.de or via a mobile app. Facebook offers private users a range of functions to connect with their friends and acquaintances and share contents with them. Private Facebook.com use is conditional upon registration by creating a user profile. Using their real names, users can enter information on themselves and their personal situation and set a profile picture. Based on this information, a personalised site is created for each user, which is subdivided into three subsites: the “profile”, “home” and the “find friends” pages. Users can see the latest news (“posts”) of other private and commercial users in the “Newsfeed” on their start pages. The order of appearance is based on an algorithm to match the user's interests. Facebook Messenger is integrated into the social network and serves for real-time bilateral or group communication. In the social network, Facebook.com offers a variety of further functionalities, e.g. a job board, an app center or event organisation.

Not only private users but also businesses, associations or business individuals can use Facebook.com to publish content in the social network to increase their reach. Publishers can create their own pages to publish content and connect with private users, e.g. via subscriptions or likes. Facebook funds its social network through online advertising offered to publishers and other businesses. The ads match a social network user's individual profile. The aim is to present users with ads that are potentially interesting to them based on their personal commercial behaviour, their interests, purchasing power and living conditions (“targeting” or “targeted advertising”).

In addition, the Facebook group offers "Facebook Business Tools", a selection of free tools and products for website operators, developers, advertisers and other businesses to integrate into their own websites, apps and online offers via programming interfaces (Application Programming Interfaces, API) pre-defined by Facebook. The selection includes social plugins ("Like" or "Share")
buttons), Facebook login and other analytics services (Facebook Analytics) implemented through “Facebook Pixel” or mobile “software development kits” (SDKs).

Besides Facebook.com, Facebook also offers Instagram, a service for sharing photos and short video clips which is often referred to as a “photo network” or “photo blogging” service. The service has been growing considerably over the last few years and is also funded through advertising. Private users have to register via the mobile app. To register, they have to enter an email address, a user name and, as an optional piece of information, a phone number. They can also upload a profile picture. They can use the Instagram camera to take pictures or record videos and edit them using filters, texts, drawings or special effects before sharing them with other users.

WhatsApp Inc. is also part of the Facebook group. In Europe it offers the mobile app WhatsApp via its Irish subsidiary WhatsApp Ltd. WhatsApp is a free service which was originally developed as a free internet-based alternative to short message services (SMS). Using the service, users can send and receive a multitude of media like text messages, photos, videos, documents, locations, voice messages and voice calls. While WhatsApp has not been monetised through advertising so far, the company announced that it was going to launch advertising in the “status” function in 2019.

Masquerade is another product used for editing and sharing pictures with filters and masks. Facebook also offers virtual reality headsets and software via its Oculus business.

Using the social network Facebook.com is conditional on the user’s agreement to Facebook’s terms of service upon registration, i.e. they have to agree to the terms of service to conclude the contract. The terms of service stipulate that Facebook processes personal data as specified in particular in the data and cookie policies. Pursuant to these policies, Facebook also collects data on users and their devices outside of Facebook-related activities via Facebook Business Tools integrated by advertisers, app developers and publishers. Facebook also processes user data across other Facebook companies and products and collects user and device-related data from its corporate services. As a legal basis for data processing, Facebook claims that the data are required to provide the service and to fulfil Facebook’s legitimate interests.

2. Legal assessment

1. Market definition

Based on the concept of demand-side substitutability, the Bundeskartellamt defines the product market as a private social network market with private users as the relevant opposite market side. The relevant geographic market is Germany.
In defining the market and considering the new provisions of Section 18(2a) and (3a) of the German Competition Act (GWB), the Bundeskartellamt first of all examined Facebook’s business model and its special characteristics as a multi-sided network market with free services. With its service Facebook.com Facebook offers an intermediary product, which, according to the content of its services, is a combination of a network and a multi-sided market pursuant to Section 18(3a) GWB. Essentially the product is a network financed through targeted advertising, which forms a multi-sided market precisely because of this form of financing. Key user groups are private users using Facebook.com without monetary compensation on the one hand, and advertisers running targeted advertisements on the other. Indirect network effects exist between the two user groups. Facebook added further market sides to its core product. One of these market sides is publishers using Facebook.com to promote their businesses with their own Facebook pages on which they publish editorial content and connect with users. Developers represent another side of the market. They can integrate Facebook into their own websites or apps by using “Application Programming Interfaces” (APIs) to integrate Facebook Products like social plugins (e.g. “Like” button), Facebook Login or the Facebook Analytics analysis service. Indirect network effects also exist between private users and the latter two sides:

As none of the above groups of Facebook users have demands similar to the group of private users, they have to be attributed to other markets. The network has to be considered a market service pursuant to Section 18(2a) GWB despite the fact that its use is not subject to fees for private users.
The product market definition also requires an analysis of the various online services commonly referred to as “social media” and their competitive relationships. Key criteria for defining the market are the high degree of product differentiation of social media and the various overlaps of their functionalities. When defining the market, strong direct network effects are also important. The Bundeskartellamt’s investigations, which included an examination of a large number of social media as well as a survey among users and competitors, and decisions by the European Commission in the Facebook/WhatsApp and Microsoft/LinkedIn cases have shown that a national market exists for social networks which essentially meet specific requirements that differ from other social media. With Google+ having disappeared from the market, this market now includes, besides Facebook, some smaller German providers of social networks. Networks like LinkedIn and Xing are designed to meet professional requirements and thus constitute a separate product market. Like the Commission in the Facebook/WhatsApp case, the Bundeskartellamt considers messaging services like WhatsApp as a separate market due to their technical characteristics and applications. The investigations have shown that although YouTube’s business model has some overlaps with those of social networks, the service is not sufficiently comparable to a social network. Snapchat, whose central function is a camera that opens automatically for taking “snaps” that are deleted after a short while, is not part of the product market either. The same applies to Twitter, Pinterest and Instagram. The latter is part of the Facebook group. When defining the market the Bundeskartellamt also looks at the extent to which internet companies shaped by network effects can show flexibility in adapting the products they offer. At least as far as the services affected in this case are concerned, it is not sufficient to have a “critical mass” of users or technical, financial and personal expertise in order to be able to enter neighbouring markets and be as successful as on the original market. As the example of Google+ has shown, a service cannot expect to have the same reach when providing a different type of service, due to strong direct network effects.

The geographic market was defined as Germany-wide as a result of the investigations, based on the fact that the service was found to be used predominantly to connect with people in the users’ own country, special national user habits and the lack of opportunities for supply-side substitution.

2. Market dominance

Facebook is the dominant company in the national market for social networks for private users pursuant to Section 18(1) in conjunction with (3) and (3a) GWB as, based on an overall assessment of all factors of market power, the company has a scope of action in this market that is not sufficiently controlled by competition.
First the Bundeskartellamt examined the user-based market share of Facebook on the relevant market. Facebook’s user-based market share is very high, especially among daily active users, where Facebook has a market share exceeding 95%. Facebook’s market share among monthly active users is above 80% and above 50% among registered users. The Bundeskartellamt considers the number of daily active users as the key indicator and relevant measurand for assessing the network’s competitive significance and market success as a social network’s success is measured by the intensity of use. Users use social networks as a virtual social space. When assessing the market share, the amount of time spent intensively using the network is an important indicator of the competitors’ actual market position. The services of the Facebook group would have a combined market share far beyond the market dominance threshold pursuant to Section 18(4) GWB, even if YouTube, Snapchat, Twitter, WhatsApp, and Instagram were included in the relevant market.

A key element of the market dominance test are the strong direct network effects of Facebook’s business model and the difficulties associated with switching to another social network. Facebook users connect with selected people in the social network, and it is difficult to motivate them to switch to another service as well. Competitors in the area of social networks have been experiencing a continuous decrease in user-based market shares in recent years; some of them have already left the market. Examples include StudiVZ and SchülerVZ, services which were temporarily operated by the Holtzbrinck publishing group and which were market leaders before Facebook entered the German market. Their operating company went into insolvency in 2017. The Lokalisten network, which was operated by ProSiebenSat.1, was discontinued in the autumn of 2016. Google+, the social network operated by the Google group, announced in the spring of 2018 that it would discontinue its service for private users and offer a payable service for internal business communications. In contrast to its competitors, Facebook’s user figures keep rising or at least stagnate at a high level. The facts that competitors can be seen to exit the market and that there is a downward trend in the user-based market shares of the remaining competitors strongly indicate a market tipping process which will result in Facebook.com becoming a monopolist. This assessment is supported by the fact that the strong identity-based network effects lead to a lock-in effect which makes it difficult for users or prevents them from switching to another social network. Existing functionalities and interfaces do not alleviate the consequences of Facebook’s incompatibility with other social networks.

Another important aspect of the examination are the indirect network effects encountered with Facebook as an advertising-funded service, which increase the barriers to market entry. Other advertising-financed platforms will find it difficult to enter the market and be successful in the long-
term as all competitors would have to enter both the user market for social networks and the online advertising market.

Facebook also has excellent access to competitively relevant data. Facebook’s comprehensive data sources are highly relevant for competition as a social network is driven by such personal data. In addition, these specific data facilitate highly personalised advertising. Combined with the direct and indirect network effects, this access to data constitutes another barrier to market entry for a competitor’s product that can be monetised.

In its overall assessment, the Bundeskartellamt took a close look at the internet’s innovative power and its significance for assessing market power. The internet’s innovative power cannot be taken as a general argument against an internet company’s market power. Instead, specific indications of a dynamic or disruptive process are required in each individual case. This applies in particular to the control of abuse of dominant positions which focuses on the current market situation. Against this background the Bundeskartellamt examined the recent innovations which Facebook referred to. The authority’s opinion is that these developments do not go beyond responses to competition from substitutes in the case of some individual functionalities. In particular in the context of pronounced direct network effects, its responses have rather shown that Facebook has been capable of successfully fighting off competitors’ innovations. As a result, there is no trend towards users withdrawing from Facebook or Facebook losing market shares to a relevant extent despite the internet’s high innovative power.

3. Abusive data policy

Using and actually implementing Facebook’s data policy, which allows Facebook to collect user and device-related data from sources outside of Facebook and to merge it with data collected on Facebook, constitutes an abuse of a dominant position on the social network market in the form of exploitative business terms pursuant to the general clause of Section 19(1) GWB. Taking into account the assessments under data protection law pursuant to the General Data Protection Regulation (GDPR), these are inappropriate terms to the detriment of both private users and competitors.

a) Data protection and competition law

The Bundeskartellamt holds that, being a manifestation of market power, the terms violate the stipulations of the GDPR and are abusive within the meaning of Section 19(1) GWB.

The authority bases its assessment on the case-law of the German Federal Court of Justice, which established an abuse of business terms in the VBL-Gegenwert and Pechstein cases based
on the general clause of Section 19(1) GWB. In its decisions taken in the *VBL-Gegenwert* cases the Federal Court of Justice considers the agreement of contract terms abusive if terms and conditions violating Sections 307ff. of the German Civil Code are applied, in particular if the fact that such terms and conditions are applied is a manifestation of market power or superior power of the party using these terms. The Federal Court of Justice held that it was necessary to balance all interests including constitutional rights in the *Pechstein* case. Accordingly, to protect constitutional rights, Section 19 GWB must be applied in cases where one contractual party is so powerful that it is practically able to dictate the terms of the contract and the contractual autonomy of the other party is abolished. If, the Court held, in such a case a dominant company handles constitutional rights of its contractual partners, the law had to intervene to uphold the protection of such rights. Relevant legal provisions in this regard were, according to the Court, the general clauses under civil law, one of which is Section 19 GWB. The Court held that these clauses should be applied with a view to balancing the conflicting positions of the contractual parties in such a way that the constitutional rights of all parties were, as far as possible, maintained.

The Bundeskartellamt holds that as far as the appropriateness of conditions agreed in an unbalanced negotiation is concerned, these decisions of the highest court apply to all other areas of the law as well. The same applies to data protection law, the purpose of which is to counter asymmetries of power between organisations and individuals and ensure an appropriate balancing of interests between data controllers and data subjects. In order to protect the fundamental right to informational self-determination, data protection law provides the individual with the right to decide freely and without coercion on the processing of his or her personal data.

The Bundeskartellamt closely examined the relation between the competition law provisions under Section 19(1) GWB and the harmonised European data protection principles of the GDPR which are mainly enforced by data protection authorities. The authority holds that it appears to be indispensable to examine the conduct of dominant companies under competition law also in terms of their data processing procedures, as especially the conduct of online businesses is highly relevant from a competition law perspective. It is the authority’s view that the European data protection regulations, which are based on constitutional rights, can or, considering the case-law of the highest German court specified above, must be considered when assessing whether data processing terms are appropriate under competition law.

The responsibility and consistency regulations in the GDPR do not rule out that the Bundeskartellamt can assess whether data processing terms infringe the GDPR. The GDPR has been in force in the Member States since May 2018. It governs the responsibility of data protection authorities and is set out to ensure a uniform level of protection and application by the national
data protection authorities. For this purpose a data protection board has been set up by the Member States to decide on data protection matters in the event of disputes. The board can also instruct the national authorities accordingly. These regulations, however, do not rule out that substantive data protection law can also be applied by authorities other than the national data protection authorities. The GDPR explicitly states that data protection law can also be enforced under civil law, i.e. full consistency is not aspired to. This applies in particular to consumer protection organisations and competitors and their associations. These entities can enforce data protection based on stipulations of the Act Against Unfair Competition (UWG) or regulations on business terms linked to data protection and also based on Section 19 GWB. A large part of the ECJ’s case law which data protection authorities and the data protection board have to consider has been obtained from civil law proceedings. Civil law proceedings promote rather than threaten the consistent implementation of data protection law, especially as the ECJ can be involved at an early stage as part of the preliminary ruling procedure. It is not evident that the consistency mechanism would rule out that the competition authority considers and interprets data protection law under Section 19 GWB and, at the same time, would allow a civil law enforcement of Section 19 GWB with regard to data protection law.

Also, data protection regulations do not suspend abuse control which is more specific. These regulations do not include final provisions regarding dominant companies, i.e. they only allow data processing by dominant companies to be examined by data protection authorities based on the direct data protection regulations, or the existing enforcement options under civil law (UWG or legislation on business terms). However, they do not include the prohibition of abusive practices which applies in particular to dominant companies. The GDPR does not explicitly state that its provisions are final, so it cannot be assumed that it leaves no further scope for examination by other authorities and under other aspects.

In the course of the proceeding the Bundeskartellamt maintained regular contact with data protection authorities none of which considered they had exclusive competence. The Conference of independent data protection authorities of the German Federal Government and the Länder (Konferenz der unabhängigen Datenschutzbehörden des Bundes und der Länder) expressly stated that the enforcement of data protection law must not be the sole response to violations of data protection requirements. Competition and antitrust law can, according to the conference, also be enforced. Even divestiture is mentioned as an option to punish the systematic circumvention of data protection. The Data Protection Officer for the city state of Hamburg explicitly supports the Bundeskartellamt’s proceeding. The Irish data protection authority also indicated that a competition authority can take action against violations of data protection requirements if dominant companies are involved.
b) Consideration of data protection aspects

In a first step, the Bundeskartellamt examined whether the data policy is appropriate based on the data protection assessments of the GDPR. It came to the conclusion that Facebook's comprehensive processing of personal data from other corporate services and Facebook Business Tools, which enable, among other things, profiling and “device fingerprinting”, violates European data protection requirements pursuant to the GDPR and is subject to the affected users’ consent pursuant to data protection requirements. Facebook, which is responsible for the processing of these data, presented or substantiated hardly any justifications in the course of the proceeding. The determined facts of the case do not indicate a sufficient legal justification for the extent of data collected and merged.

There is no effective consent pursuant to Art. 6(1a) of the GDPR. The reasons for this include the fact that, in view of Facebook's dominant position in the market, users consent to Facebook’s terms and conditions for the sole purpose of concluding the contract, which cannot be assessed as their free consent within the meaning of the GDPR.

Facebook does not have to process data to fulfil its contract pursuant to Art. 6(1b) GDPR. This reason for justification has to be narrowly interpreted, i.e. it has to be considered whether the unilateral determination of the contract details has to be taken into account. Particularly, it cannot be substantiated that the service has to process data to the extent that has been determined in the course of the examination for reasons of efficiency and advantages of a personalised service. If this view is taken, the company would be entitled to unlimited data processing solely on the grounds of its business model and product properties as well as the company's concept of product quality. Any kind of data processing would then have to be deemed necessary for fulfilling the contract as all data carry some information on the individual user. Processing data from third-party sources to the extent determined by Facebook in its terms and conditions is neither required for offering the social network as such nor for monetising the network through personalised advertising, as a personalised network could also be based to a large extent on the user data processed in the context of operating the social network. The latter is not a subject of the proceeding at hand. None of the stipulations of Art. 6(1c-e) GDPR apply to justify data processing for special purposes.

Even a comprehensive assessment of interests did ultimately not lead to the conclusion that Facebook’s interest in processing data according to the terms and conditions it set outweighs other interests (Art. 6(1f) GDPR). This assessment is based on an evaluation of the legitimate interests Facebook brought forward, third-party interests and user interests. Criteria considered were the consequences for the affected users, taking into account the data type and the way in
which it is processed, reasonable expectations of users and the respective positions of Facebook and its users. What also had to be considered pursuant to the guidelines of the data protection board was that Facebook as a dominant company has bargaining power over its users and is in a position to impose far-reaching data processing conditions, which users cannot prevent as they have no additional control mechanisms. Data processing to the extent at hand cannot be justified without the users’ voluntary consent. Voluntary consent to their information being processed cannot be assumed if their consent is a prerequisite for using the Facebook.com service in the first place.

\[c\) Manifestation of market power\]

The violation of data protection requirements found is a manifestation of Facebook’s market power. According to the case-law it is not necessary to determine that the conduct, i.e. the violation, was only possible in the first place because of market dominance and that other market participants did not have a chance to behave in a similar way. Instead, it is sufficient to determine that the two aspects are linked by a causality which is either based on normative aspects or the outcome. Both aspects can be assumed to be fulfilled in this case.

Normative causality with regard to the violation of data protection rules exists as the restriction of the private users’ right to self-determination is clearly linked to Facebook’s dominant position. Data protection law considers corporate circumstances like market dominance, the concrete purpose and the amount of data processed in its justifications, i.e. Facebook’s market position is significant when assessing the violation.

In addition to that there is a causality in terms of the outcome as Facebook’s conduct linked to its market dominance, which was the subject of the proceedings at hand, impedes competitors because Facebook gains access to a large number of further sources by its inappropriate processing of data and their combination with Facebook accounts. It has thus gained a competitive edge over its competitors in an unlawful way and increased market entry barriers, which in turn secures Facebook’s market power towards end customers.

Both data protection law and competition law consider the aspect of an unbalanced negotiation position, i.e. a weighing up of interests under competition law which could be required in addition to the examination under data protection law, and reach the same conclusions due to the largely identical considerations including market dominance. In addition, pursuant to the Pechstein case-law, assessments with regard to constitutional rights have to be included in assessments of interests under competition law. Again, these assessments are largely identical with the assessments under data protection law.
As Facebook is a dominant company users cannot protect their data from being processed from a large number of sources, i.e. they cannot decide autonomously on the disclosure of their data. However, it must be ensured that the interests of the opposite market side are sufficiently considered if a provider is a dominant company which is not subject to sufficient competitive control. The terms and conditions under review have a considerable reach as Facebook’s market power extends beyond its social network and consumers’ data are collected whenever they use the internet. While the efficiencies of a data-driven business model for consumers are generally acknowledged, the outlined extent of data processing is to be deemed inappropriate and hence abusive.

4. Decision

Based on the above and in exercising due discretion, the Bundeskartellamt has prohibited the data processing policy Facebook imposes on its users and its corresponding implementation pursuant to Sections 19(1), 32 GWB and ordered the termination of this conduct. The prohibition refers to the terms of processing personal data as expressly stated in the terms of service and detailed in the data and cookie policies as far as they involve the collection of user and device-related data from other corporate services and Facebook Business Tools without the users’ consent and their combination with Facebook data for purposes related to the social network. The Bundeskartellamt also prohibited the implementation of these terms and conditions in actual data processing procedures which Facebook performs based on its data and cookie policies. In the order to terminate the infringement Facebook is ordered to implement the necessary changes and to adapt its data and cookie policies accordingly within a period of twelve months. In addition to that Facebook has been given a deadline of four months to present an implementation road map for the adjustments. The time limits can be suspended by an emergency appeal to the Düsseldorf Higher Regional Court. Facebook has already appealed against this decision to the Düsseldorf Higher Regional Court and requested that the suspensive effect of the appeal be restored.
March 19, 2019

The Honorable Joseph J. Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Rohit Chopra
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Noah Joshua Phillips
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Rebecca Kelly Slaughter
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

The Honorable Christine S. Wilson
Commissioner
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Dear Chairman Simons, Commissioner Chopra, Commissioner Phillips, Commissioner Slaughter, and Commissioner Wilson:

I write to urge the Commission to open an immediate investigation into whether Facebook has violated the antitrust laws.

It has been a year since news broke that Facebook exposed user data to Cambridge Analytica, a political consulting firm that sought to manipulate voter behavior.¹ Since then, a torrent of reports has revealed that the Cambridge Analytica scandal was part of a much broader pattern of

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misconduct by Facebook. This includes mounting evidence of anticompetitive behavior. Facebook’s predatory acquisition strategy, foreclosure of rivals from its platform, and declining product quality strongly suggest that it has abused its position as a monopoly to undermine competition and the competitive process.

An antitrust investigation responding to these revelations should focus on at least three aspects of Facebook’s conduct.

First, the Commission should examine whether any of Facebook’s acquisitions substantially lessened competition in violation of Section 7 of the Clayton Act. Since its founding, Facebook has acquired over 75 companies. Two of the most significant purchases were Instagram, which Facebook bought in 2012 for $1 billion, and WhatsApp, which Facebook purchased in 2014 for $19 billion. Through these acquisitions, Facebook now owns three of the top four, and four of the top eight, social media apps.

When Facebook acquired Instagram, the photo-based app posed a competitive threat. It was growing faster than even Facebook had at its peak and proved especially attractive to teenagers and young adults, a demographic Facebook was losing. Moreover, buying up Instagram enabled Facebook to make the switch to mobile, a market where Facebook was struggling to adapt. In

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hindsight, it is clear that by approving this purchase, the Commission enabled Facebook to swallow up its most significant rival in the social network market.

WhatsApp, meanwhile, threatened to outdo Facebook Messenger. As documents released by the UK Parliament reveal, Facebook had been using its surveillance tool Onavo to obsessively track WhatsApp.\(^8\) By doing so it learned that WhatsApp’s market reach was expanding steadily, outdoing then-popular apps like Foursquare and Tumblr while also beating out Facebook Messenger in certain markets.\(^9\) In other words, WhatsApp “was quickly demonstrating that it could compete with Facebook on its most important battleground.”\(^10\) Instead of protecting this competition—as the antitrust laws require—the Commission permitted Facebook to neuter it. And while Facebook promised at the time of the acquisition that “nothing” will change for WhatsApp users’ privacy,\(^11\) it has since gone on to use WhatsApp users’ data for marketing purposes—a breach of its commitment.\(^12\)

Since the Commission generally does not share with the public its analysis justifying inaction, we do not know what led the agency to approve these acquisitions. But it is clear that allowing Facebook to purchase Instagram and WhatsApp has deprived users of critical competition. As Facebook’s serial disregard for users’ privacy has prompted some users to delete their Facebook accounts, they find themselves unable to escape Facebook’s ecosystem.\(^13\) Given that Facebook used spyware to systematically track and target actual, potential, and nascent rivals, it is vital to

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9 Six4Three, at 12-15.


12 EPIC, Facebook to Collect WhatsApp Data, Violating FTC Order and Privacy Promises (Aug. 25, 2016), https://epic.org/2016/08/facebook-to-collect-whatsapp-u.html (“WhatsApp’s recent announcement indicates users will have 30 days to opt-out of data transfers to Facebook, in violation of the law and the FTC’s Order.”).

13 Users who decided to quit Facebook in light of its privacy breaches discovered that cutting it out entirely would require also deleting Instagram and WhatsApp. See Will Oremus, If You Delete Facebook, Do You Also Have to Delete Instagram and WhatsApp?, SLATE (Dec. 22, 2018), https://slate.com/technology/2018/12/can-you-delete-facebook-if-you-dont-also-delete-instagram-and-whatsapp.html; see also id. (“After all, the unfortunate reality is that there aren’t a lot of prominent social networks that Facebook doesn’t own.”). See also https://marketingland.com/facebook-lost-15-million-users-marketers-remain-unfazed-258164. It’s also worth noting that Facebook collects data even on non-Facebook users. Kurt Wagner, This Is How Facebook Collects Data on You Even If You Don’t Have an Account, RECODE (Apr. 20, 2018), https://www.recode.net/2018/4/20/17254312/facebook-shadow-profiles-data-collection-non-users-mark-zuckerberg (“There is no way to opt out of this kind of data collection.”).

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examine whether any of Facebook’s acquisitions—including of smaller social networks—unlawfully lessened competition.\(^\text{14}\)

Second, the agency should investigate whether Facebook has engaged in exclusionary conduct in violation of Section 5 of the Federal Trade Commission Act.\(^\text{15}\) Documents reveal that Facebook has responded to competitive threats by cutting them from its network. For example, when Vine, a social application through which users can make short videos, attempted to let users find friends through Facebook’s platform, Facebook quickly shut down the feature.\(^\text{16}\) The Commission should examine whether Facebook has weaponized application programming interfaces (APIs) to undermine competition.

Finally, the Commission should consider whether Facebook has abused its monopoly power in violation of Section 5 of the Federal Trade Commission Act.\(^\text{17}\) Experts have noted that while Facebook faced competition, it was not able to condition use of its network on constant surveillance; in fact, users expressly rejected this bargain.\(^\text{18}\) It was only after Facebook achieved a dominant position that it could successfully backtrack on privacy commitments and initiate widespread commercial surveillance of users.\(^\text{19}\) This dramatic decrease in privacy has amounted to quality degradation of Facebook’s service. The Commission should investigate whether Facebook is using its monopoly power to degrade quality below what a competitive marketplace would allow.

Thank you for your attention to this important matter. It is critical that the Commission robustly enforce the antitrust laws to prevent anticompetitive acquisitions and anticompetitive conduct.


\(^{16}\) Six4Three, at 15, 43.


\(^{18}\) Srinivasan, supra note 3, at 48-62.

\(^{19}\) Id. at 69-81.
Sincerely,

David N. Cicilline  
Chairman  
Subcommittee on Antitrust,  
Commercial and Administrative Law  
Committee on the Judiciary

cc: The Honorable Jerrold Nadler, Chairman, Committee on the Judiciary

The Honorable Doug Collins, Ranking Member, Committee on the Judiciary

The Honorable F. James Sensenbrenner, Ranking Member, Subcommittee on Antitrust,  
Commercial and Administrative Law

The Honorable Makan Delrahim, Assistant Attorney General, Department of Justice
Almost eight years ago, the Federal Trade Commission and Facebook agreed to settle allegations that Facebook’s information-sharing and privacy practices violated Section 5 of the Federal Trade Commission Act because they were unfair and deceptive. As part of that agreement, memorialized in an administrative order entered by the FTC, Facebook committed to maintaining a privacy program and to not misrepresenting the privacy protections it afforded its users. But according to the United States, Facebook did not keep its word, and over the next months and years it violated both the FTC Act and the order in many ways. Last year, the parties agreed to settle these fresh allegations about Facebook’s privacy practices. Before the Court is their consent motion to enter a proposed stipulated order. Among other things, the order would require Facebook to pay a $5 billion civil money penalty—by far the largest penalty ever won by the United States on behalf of the FTC—and impose injunctive relief in the form of an amended administrative order to be entered by the FTC that would require Facebook to take a variety of additional measures to protect its users’ personal information.

In the Court’s view, the unscrupulous way in which the United States alleges Facebook violated both the law and the administrative order is stunning. And these allegations, and the
briefs of some amici, call into question the adequacy of laws governing how technology companies that collect and monetize Americans’ personal information must treat that information. But those concerns are largely for Congress; they are not relevant here. Mindful of its proper role, and especially considering the deference to which the Executive’s enforcement discretion is entitled, the Court will grant the consent motion and enter the order as proposed.

I. Background

A. Facebook

Facebook, Inc. (“Facebook”) operates a social-networking service through its website and mobile applications. ECF No. 3 (“Compl.”) ¶ 2. Those applications connect Facebook’s users, who each create a profile that includes their personal information, with “Friends” who also have Facebook accounts and profiles. Id. Through its service, Facebook collects and maintains huge amounts of its users’ information. Id. As of 2018, Facebook had more than 2.2 billion monthly active users worldwide. Id. And over 100 million Americans use Facebook every day to share personal information, such as their name, date of birth, hometown, current city, employer, relationship status, political views, photos of minor children, and membership in health-related and other support groups. Id. In addition, Facebook users may install and use applications developed by third parties that allow users to share information with each other. Id. The collection and maintenance of its users’ personal information is an essential part of Facebook’s business model. That model monetizes users’ personal information by deploying it for advertising; indeed, almost all of Facebook’s revenue comes from advertising. Id. ¶ 3.

B. 2012 Consent Agreement and Order

In 2012, the Federal Trade Commission (FTC) filed an administrative complaint alleging that Facebook engaged in unfair and deceptive acts or practices in violation of Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (“FTC Act”). See In the Matter of Facebook,
Inc., Dkt. No. C-4365, 2012 WL 3518628 (F.T.C.) (July 27, 2012) (“2012 Action”). The FTC brought eight counts alleging, among other things, that Facebook misled its users about (1) its privacy settings and privacy policy changes, see id. ¶¶ 10–29; (2) how much it shared its users’ personal information with third-party application developers; id. ¶¶ 30–33; (3) how much it shared its users’ personal information with outside advertisers, see id. ¶¶ 34–42; (4) the steps it took to verify the security and privacy practices of third-party application developers, see id. ¶¶ 43–49; (5) how much it shared its users’ personal information, including photos and videos, with third parties after a user deleted its account, see id. ¶¶ 50–55; and (6) its compliance with international privacy protocols, see id. ¶ 56–63.

Facebook and the FTC reached a settlement in August 2012. Compl. ¶ 28. The FTC then issued an order (“2012 Order”)—which Facebook’s General Counsel signed on the company’s behalf—outlining remedial actions Facebook had to take. See id. ¶¶ 28–34. Facebook was prohibited from making misrepresentations about the extent to which it maintains the privacy or security of its users’ personal information; the extent to which its users can control the privacy of that information, and how they can do so; and the extent to which it makes its users’ personal information accessible to third parties. See id. ¶ 29. Facebook was also required to establish and maintain “a comprehensive privacy program that [was] reasonably designed to (1) address privacy risks related to the development and management of new and existing products and services for consumers, and (2) protect the privacy and confidentiality of [its users’ personal] information.” Id. ¶ 31. Facebook’s privacy program was also required to consider reasonably foreseeable risks to users’ privacy, and Facebook had to monitor and evaluate the program on an ongoing basis. See id. The order expires in July 2032, or 20 years from the date the FTC filed its administrative complaint. See 2012 Action at *83.
C. This Action

1. Complaint

The United States now alleges that Facebook violated the 2012 Order by “subvert[ing] users privacy choices to serve its own business interests” in several ways, starting almost immediately after agreeing to comply with the 2012 Order. Compl. ¶ 4. Although Facebook led its users to believe they could restrict who could view their personal information, it allegedly shared that information with third parties without the user’s knowledge. See Compl. ¶¶ 35–50. For example, Facebook allegedly told its users that they could limit those who could see their posts to just “Friends,” when in reality—and without warning to the user—doing so would also allow developers of third-party applications used by their “Friends” to access the post. See id. 46–48. Facebook allegedly permitted third-party developers to access these posts even though it was aware of how that practice compromised its users’ privacy interests. See id. ¶¶ 81–91. And Facebook allegedly continued to allow a subset of third-party developers to access its users’ personal formation in this way without their users’ knowledge even after it announced, two different times, that it would stop doing so. See id. ¶¶ 92–100; 106–13. Facebook also allegedly automatically activated certain facial recognition technologies on a subset of about 60 million user accounts and maintained that technology’s activation while telling its users that it would only do so if a user requested it. See id. ¶¶ 144–54.

The United States also alleges that Facebook’s privacy settings and policies compromised its users’ privacy in various other ways. For example, Facebook allegedly misled its users through its desktop and mobile interfaces by causing them to default to settings that were not privacy-protective; removing key disclaimers; and making interfaces hard to navigate, especially when it came to users’ ability to stop the sharing of their personal information with developers of third-party applications used by their “Friends.” See id. ¶¶ 51–80. Moreover, Facebook’s so-
called “Privacy Checkup,” a tool that it represented would allow users to control who had access to their information, allegedly failed to alert users that third-party developers could continue to view their information no matter what settings were selected through the “Privacy Checkup.”

See id. ¶¶ 101–105. And even though Facebook agreed to maintain a reasonable privacy program, it allegedly failed to screen third-party application developers before giving them access to users’ information and did not consistently enforce the few policies it had about the protection and use of its users’ information when developers violated those policies. See id. ¶¶ 114–24. In fact, Facebook’s enforcement decisions allegedly “took into account the financial benefit that Facebook considered the developer to offer.” Id. ¶ 123. Moreover, because of Facebook’s deficient controls, the company allegedly still did not know at the time the Complaint was filed how much data it improperly released to third-party application developers, exactly to which developers the data was released, or the purposes for which the developers used it. See id. ¶¶ 126–27.

Facebook is also alleged to have misled users about what information it shared with advertisers. Facebook purportedly encouraged users to provide their telephone numbers so that they could protect their accounts with two-factor authentication. See id. ¶¶ 128–30. Facebook did not, however, warn these users that it would also use these telephone numbers for advertising purposes. See id. ¶¶ 131–43.

Based on this alleged conduct, the Complaint filed by the United States includes five counts accusing Facebook of violating the 2012 Order by misrepresenting to its users how much control they had over their personal information and how much third-party application developers could access that information, see id. ¶¶ 155–75, 183–86, and by failing to maintain a reasonable privacy program, see id. ¶¶ 176–82. The Complaint also includes one count alleging
that Facebook violated Section 5 of the FTC Act by failing to disclose to its users that it would use the telephone numbers they provided to it for two-factor authentication for advertising purposes as well.  See id. ¶¶ 187–90.

2.  **Stipulated Order**

The parties represent that they have reached a settlement.  See ECF No. 4 (“Consent Mtn.”) at 1.  The United States has moved, with Facebook’s consent, for the Court to enter a stipulated order that imposes a $5 billion civil money penalty on Facebook and imposes injunctive relief in the form of an amended administrative order to be entered by the FTC.  See ECF No. 4-1 (“Stipulated Order”) at 1–4.  The amended administrative order, included as Attachment A to the Stipulated Order, requires Facebook to take a series of remedial steps, including: (1) ceasing its misrepresentations about a host of matters, including its collection, use, and disclosure of its users’ personal information; the extent to which it maintains the privacy or security of that information; the extent to which users can control the privacy of that information, and how they can do so; and the extent to which it makes its users’ personal information accessible to third parties; (2) clearly disclosing when it will share its users’ personal information with third parties, and obtaining a user’s express consent to do so if the information sharing goes beyond the restrictions imposed by the user’s privacy settings; (3) deleting or de-identifying users’ personal information within a reasonable time after a user deletes it or closes her account; (4) stopping using telephone numbers provided by users for security purposes for advertising purposes as well; (5) obtaining a user’s specific consent before applying facial recognition technology to their account; (6) implementing a more robust privacy program, which must include safeguards that apply to third parties with access to a user’s personal information; (7) creating an independent committee of Facebook’s board of directors to oversee information privacy efforts; (8) designating a corporate officer in charge of monitoring its privacy program
and ensuring the program is effective—and who only can only be removed with a majority vote
of the newly created board committee; (9) commissioning regular, independent assessments of
its privacy practices and providing them to the FTC; (10) alerting the FTC when it discovers that
more than 500 users’ personal information has been compromised in some way; and (11)
undertaking other reporting and recordkeeping obligations, including annually certifying
compliance with the order and facilitating any FTC investigation into its compliance. See id. at
8–29.¹ In exchange, under the Stipulated Order, Facebook receives considerable reprieve from
liability. The “Stipulated Order resolves all consumer-protection claims known by the FTC prior
to June 12, 2019, that [Facebook], its officers, and directors violated Section 5 of the FTC Act.”
See id. at 1–2. The amended administrative order terminates 20 years after it is issued, or 20
years after the United States or the FTC files a complaint against Facebook alleging that it
violated the order. See id. at 28–29.

II. Legal Standard

“[P]rior to approving a consent decree a court must satisfy itself of the settlement’s
overall fairness to beneficiaries and consistency with the public interest.” Citizens for a Better
Env’t v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (internal quotation marks omitted). But
the Court’s role is not to “inquire into the precise legal rights of the parties nor reach and resolve
the merits of the claims or controversy.” Id. (internal quotation omitted). Rather, it “need only
determine that the settlement is fair, adequate, reasonable and appropriate under the particular
facts and that there has been valid consent by the concerned parties.” Id.; see also United States

¹ Because the Stipulated Order and the amended administrative order are both included in ECF
No. 4-1, the Court cites to page numbers in the document’s ECF header.
‘make[s] a mockery of judicial power,’ the Court should accept an agreement between the parties.”) (quoting United States v. Microsoft Corp., 56 F.3d 1448, 1462 (D.C. Cir. 1995)). Both the judiciary and the public at large have an interest in avoiding costly litigation, and so voluntary settlements are highly favored. Citizens for a Better Env’t, 718 F.2d at 1126.

III. Analysis

Applying this deferential standard—and despite the underhanded conduct of which the FTC accuses Facebook—the Court finds that the Stipulated Order passes muster. Specifically, the Court finds that the parties consented to the order, and that it is fair, reasonable, and in the public interest.

A. Consent

The parties represent that they consent to the Court’s entry of the Stipulated Order to settle the allegations in the Complaint. See Consent Mtn. at 1–2; see also Stipulated Order at 6–8. They also represent that it emerged from lengthy negotiations, see Consent Mtn. at 7, and the Court notes that both parties are sophisticated and ably represented by counsel. These facts amply support the Court’s conclusion that the parties have validly consented to the Stipulated Order. See Wells Fargo, 891 F. Supp. 2d at 145.

B. Fairness

Procedurally, “[v]alid consent that resulted from good faith bargaining itself indicates that the agreement is procedurally fair,” id., and there is no evidence of any conflicts of interest that might have tainted the negotiating process, see id. Substantively, the Stipulated Order reflects a compromise and includes benefits to both parties. The United States receives what it asserts is by far the largest civil money penalty ever obtained on behalf of the FTC, and the second largest in any context, Consent Mtn. at 4, as well as extensive injunctive relief, described in more detail below. Facebook obtains a release from Section 5 violations known to the FTC.
Stipulated Order at 1–2. And both parties avoid the cost and uncertainty associated with lengthy
litigation. That Facebook does not admit the allegations in the Complaint does not suggest that
the resolution is unfair. See Stipulated Order at 2; Microsoft, 56 F.3d at 1461; see also Wells Fargo, 891 F. Supp. 2d at 145.

C. Reasonableness

The D.C. Circuit has explained that a district court evaluating a consent agreement should
be cautious about second guessing the parties’ judgments. See Microsoft, 56 F.3d at 1460–61. After all, “[r]emedies which appear less than vigorous may well reflect an underlying weakness in the government’s case, and for the district judge to assume that the allegations in the
complaint have been formally made out is quite unwarranted.” Id. at 1461. Although the
allegations the United States levels against Facebook for duplicitous privacy-related
representations to its users are shocking, it is not appropriate for the Court to judge the Stipulated Order as if it were proposed after the United States had already proven those allegations up at trial. See id. (noting that it is “inappropriate for the judge to measure the remedies in the decree as if they were fashioned after trial”). Rather, the Court’s analysis must focus on whether the proposed order achieves its stated objective. See Envtl. Def. v. Leavitt, 329 F. Supp. 2d 55, 71 (D.D.C. 2004) (“The factors for determining the adequacy, reasonableness and appropriateness of a consent decree focus on the extent to which the decree is confined to the dispute between the parties and whether the decree adequately accomplishes its purported goal.”). In other words, the Court must assess whether the Stipulated Order is a reasonable resolution of the allegations outlined in the Complaint.

Judged by that standard, the Court concludes the Stipulated Order clears the modest bar
of reasonableness. The allegations in the Complaint reflect many ways in which Facebook
purportedly acted improperly. Some of these allegations represent discrete and poorly
considered decisions, such as allegedly encouraging users to provide phone numbers to better secure their accounts, but then using those same numbers for advertising without telling users beforehand. Others appear to reflect Facebook’s willingness to deceive its users outright, such as allegedly telling the public that it would not share their personal information with third parties when it was continuing to do so. And still others represent systemic oversight failures, such as allegedly allowing third parties to access users’ personal information without the users’ knowledge and without controlling how those third parties would use the information. Most of these allegations represent violations of the 2012 Order; several are new violations of law. But all of them suggest that the privacy-related decisionmaking of Facebook’s executives was subject to grossly insufficient transparency and accountability.

The Stipulated Order appears reasonably calculated to address these allegations. To begin with, it imposes a $5 billion fine to deter similar conduct by Facebook in the future. Stipulated Order at 3. That is, by any measure, a significant amount. The United States contends it is “the largest civil penalty ever obtained . . . on behalf of the FTC—dwarfing the previous record of $168 million.” ECF No. 28 at 3. The United States also argues that the total breaks down to $5.56 per violation, “commensurate with . . . civil penalties obtained in contested cases similarly involving millions of FTC Act violations by large corporations.”

2 Consent Mtn. at 4. Facebook also claims that the fine looms even larger when compared to the largest civil penalty ever assessed by the FTC where—as here—no consumer harm is alleged to have been caused: $22.5 million. See ECF No. 30 at 11-12. The fine is also significant when compared to Facebook’s bottom line; the parties agree it represents nearly a quarter of Facebook’s after-tax earnings.

profit in 2018. *Id.* at 3. Facebook also argues that the fine “is orders of magnitude greater than what the FTC could reasonably have achieved at trial” given the statutory penalties and the arguments available to it concerning how to calculate its alleged violations. ECF No. 30 at 11. And the United States, citing the FTC’s “hard-fought” victory in *United States v. Dish Network*, 256 F. Supp. 3d 810 (C.D. Ill. 2017), appears to acknowledge that it would have been unlikely to obtain more after a trial. See ECF No. 28 at 7–8. The Court has no reason to doubt that judgment.

As important, the injunctive relief in the amended administrative order to be entered by the FTC contains new measures aimed at ensuring that Facebook complies with its legal obligations going forward. Under the amended administrative order, Facebook will have to consider privacy at every stage of its operations and provide substantially more transparency and accountability for its executives’ privacy-related decisions.

The amended administrative order will require Facebook, through its enhanced privacy program, to consider and document in writing privacy risks, safeguards, training, and procedures related to each of its products and services—including new safeguards for overseeing third-party application developers with access to users’ information. At the operational level, the order will require Facebook to designate one or more corporate officers in charge of monitoring its privacy policies and ensuring they are effective—and who only a committee of its board of directors can remove. At the corporate governance level, Facebook must stand up a new independent board committee dedicated to information privacy—again, whose members enjoy significant removal protections. Under the order, an independent, third-party assessor approved by the FTC will evaluate and test Facebook’s privacy efforts, producing annual reports that must be provided to the FTC and Facebook’s new independent board committee. Significantly, Facebook’s Chief
Executive Officer will have to certify regularly that Facebook is meeting its obligations under both its privacy program and the order, potentially subjecting him to civil or criminal penalties. Facebook will have to alert the FTC when significant privacy-related breaches occur. And the order will empower both the Department of Justice and the FTC to demand extensive information from Facebook to evaluate its compliance for themselves.

Finally, it bears mentioning that the requirements in the Stipulated Order are clear. See *Microsoft*, 56 F.3d at 1461–62 (observing that “the district judge who must preside over the implementation of the decree is certainly entitled to insist on that degree of precision concerning the resolution of known issues as to make his task, in resolving subsequent disputes, reasonably manageable”). The Stipulated Order spells out Facebook’s obligations precisely, it defines key terms in detail, and it incorporates specific deadlines for completion of its obligations.

Amici urge the Court to reject the Stipulated Order in part because they argue it does not go far enough. For example, the Electronic Privacy Information Center (EPIC) argues that the $5 billion penalty is too low and that the injunctive relief is insufficient. ECF No. 26 at 18–22. EPIC complains that the Stipulated Order does not “require meaningful changes in Facebook’s business practices or establish new privacy protections for Facebook users.” *Id.* at 16. It suggests, for example, that the United States should have required Facebook to adopt the “Code of Fair Information Practices,” which “have been incorporated into other privacy laws and frameworks across the world,” *id.* at 22–23, or forced Facebook to unwind its acquisitions of WhatsApp and Instagram. *Id.* at 24. Other amici would have liked to see more protections related to children included. See ECF No. 25 at 16–20.

As the United States concedes, amici raise some “broad and conceptually interesting policy questions about data-privacy law in the United States generally.” ECF. No. 28 at 1. But
the overall terms of the Stipulated Order are not unreasonable simply because they do not apply an entirely different privacy-focused legal regime to Facebook or require the company to be broken apart. And the Court’s role is not to play the Executive’s part in deciding how to enforce the law. See Microsoft, 56 F.2d at 1462 (cautioning that “when the government is challenged for not bringing as extensive an action as it might, a district judge must be careful not to exceed his or her constitutional role”); see also Ass’n of Irritated Residents v. EPA, 494 F.3d 1027, 1031 (D.C. Cir. 2007) (“Although the Supreme Court’s decision in Chaney applies directly to agency decisions not to enforce a statute, we have also applied it to an agency’s decision to settle an enforcement action.”) (citing Heckler v. Chaney, 470 U.S. 821, 838 (1985)). As noted above, in evaluating the Stipulated Order’s reasonableness, the Court may not even assume that Facebook violated the FTC Act or the 2012 Order in the first place. See Microsoft, 56 F.3d 1461. While the Court might well have fashioned different remedies were it doing so out of whole cloth after a trial, none of amici’s criticisms call into question the Stipulated Order’s reasonableness, or whether it is otherwise appropriate.

For these reasons, the Court finds that proposed remedies in the Stipulated Order are reasonable in light of the allegations in the Complaint.

D. Public Interest

Finally, the Court must consider whether entering the Stipulated Order accords with the public interest; “in other words, that the agreement is ‘not unlawful, unreasonable, or against public policy.’” Wells Fargo, 891 F. Supp. 2d at 146 (quoting United States v. District of Columbia, 933 F. Supp. 42, 47 (D.D.C. 1996). As discussed above, the Stipulated Order contains an unprecedented civil money penalty as well as a series of measures designed to address the allegations in the Complaint.
In addition, though, this inquiry calls on the Court to consider whether entering the order will “automatically affect the rights of third parties.” Id. Amici spill considerable ink on this point. As discussed above, the Stipulated Order would release Facebook from all claims that it violated the 2012 Order as well as “all consumer-protection claims known by the FTC prior to June 12, 2019 that [Facebook], its officers, and directors violated Section 5 of the FTC Act.” Stipulated Order at 1–2. Amici argue that the breadth of this release is unprecedented and reason alone to reject the Stipulated Order. See ECF No. 25; ECF No. 26 at 13. They point to the statements of two dissenting FTC Commissioners who both cited the scope of the release as a reason they voted against the Stipulated Order. See ECF No. 25 at 13 n.3, 16; ECF No. 26 at 13, 15. Amici also argue that the they will be harmed by the scope of the Stipulated Order because it would preclude the FTC from bringing other enforcement actions based on complaints amici and others have filed with the agency, including for alleged violations of the 2012 Order. See ECF No. 25 at 15–25; ECF No. 26 at 15–16.

These arguments by amici do not ultimately cast doubt on whether the Stipulated Order is in the public interest. First, the Stipulated Order does not strip amici—or anyone else in a similar situation—of any rights, because they have no right to enforce either Section 5 of the FTC Act or the 2012 Order. As even they acknowledge, Section 5 of the FTC Act does not contain a private right of action. See ECF No. 25 at 31; see also United States v. Philip Morris Inc., 263 F. Supp. 2d 72, 78 (D.D.C. 2003). And as for the FTC’s administrative orders, the D.C. Circuit “has opted for a bright line rule . . . that third parties to government consent decrees cannot enforce those decrees absent an explicit stipulation by the government to that effect.” SEC v. Prudential Sec. Inc., 136 F.3d 153, 158 (D.C. Cir. 1998). Finally, amici do not suggest that the Stipulated Order will somehow preclude them from doing what they have a right to do:
file complaints with the FTC accusing Facebook of violating the FTC Act or any applicable administrative order.

Second, the admittedly broad scope of the release does not mean that the settlement is not in the public interest. As the United States explains, the Stipulated Order does not stop the FTC from bringing new enforcement actions against Facebook should it learn of additional violations of Section 5 of the FTC Act, even if those violations occurred before July 12, 2019. See ECF No. 28 at 11. And the United States represents that the proposed settlement “does not in fact release any actual violations of the FTC Act beyond those discussed in the Complaint.” Id. That is so because, after “extensive investigation and review of submitted consumer complaints, the FTC [knows] of no other cognizable violations that occurred before June 12, 2019.” Id.; see also id. at 11 n.4 (adding that “the vast majority of submitted consumer complaints involving Facebook did not even address a privacy issue or implicate the 2012 Order, and none known to the FTC raised a potential issue not covered by the proposed settlement”). Additionally, a majority of the agency’s Commissioners have represented that the Stipulated Order sufficiently addresses all known violations of the 2012 Order as well. Statement of Chairman Joe Simons and Commissioners Noah Joshua Phillips and Christine S. Wilson Regarding the Matter of Facebook, Inc., at 7–8 (July 24, 2019),

https://www.ftc.gov/system/files/documents/public_statements/1536946/092_3184_facebook_majority_statement_7-24-19.pdf. Thus, it seems evident that the United States made a carefully considered judgment to resolve these violations as it proposes through the Stipulated Order, a judgment this Court is ill-equipped to second-guess.3 Amici and even some FTC Commissioners

3 Unlike violations of the FTC Act, the Stipulated Order also releases Facebook from violations of the 2012 Order that are unknown to the United States, see Stipulated Order at 1–2. That is,
may disagree with that decision, but it does not follow that the Stipulated Order is not in the
Court’s function is not to determine whether the resulting array of rights and liabilities is the one
that will best serve society, but only to confirm that the resulting settlement is within the reaches
of the public interest.”) (cleaned up)); *see also Citizens for a Better Env’t*, 718 F.2d 1126 (“Not
only the parties, but the general public as well, benefit from the saving of time and money that
results from the voluntary settlement of litigation.”).

For these reasons, the Court holds that entering the Stipulated Order is in the public
interest.

**IV. Conclusion**

For all these reasons, the Court will grant the Consent Motion for Entry of Stipulated
Order, ECF No. 4, and enter the Stipulated Order. The Court ends by noting that under the
Stipulated Order it retains jurisdiction over this matter, including to enforce its terms. *See*
Stipulated Order at 5. In the event that the parties return to this Court because the United States
alleges—once again—that Facebook has reneged on its promises and continued to violate the
law or the terms of the amended administrative order, the Court may not apply quite the same
deferece to the terms of a proposed resolution. As the D.C. Circuit has explained, a district
court must be especially deferential “when the proposed decree comes to a district judge in the
undoubtedly, a concession to Facebook. Still, the Court finds that the Stipulated Order is in the
public interest and is otherwise reasonable, given that it preserves the FTC’s right to bring
enforcement actions for any presently unknown violation of the law. Moreover, a majority of the
agency’s Commissioners are satisfied, given the FTC’s extensive investigation, that the terms of
the Stipulated Order are “more than adequate to remedy any as-yet-unknown violation” of the
2012 Order. *Statement of Chairman Joe Simons and Commissioners Noah Joshua Phillips and
Christine S. Wilson Regarding the Matter of Facebook, Inc.*, at 7–8 (July 24, 2019),
first instance as a settlement between the parties.” *Microsoft*, 56 F.3d at 1461. But, on the other hand, when “a district judge has administered a consent decree for some period of time,” and is therefore likely more familiar with the relevant context, “the lack of an initial trial is, at least marginally, less of an inhibition” when weighing the appropriateness of a proposed remedy. *Id.*

/s/ Timothy J. Kelly
TIMOTHY J. KELLY
United States District Judge

Date: April 23, 2020
FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on May 18, 1998;

Plaintiff States, having filed their complaint herein on the same day;
Defendant Microsoft Corporation ("Microsoft") having appeared and filed its answer to such complaints;

The Court having jurisdiction of the parties hereto and of the subject matter hereof and having conducted a trial thereon and entered Findings of Fact on November 5, 1999, and Conclusions of Law on April 3, 2000;


Upon the record at trial and all prior and subsequent proceedings herein, it is this day of June, 2000, hereby:

ORDERED, ADJUDGED, AND DECREED as follows:

1. Divestiture

a. Not later than four months after entry of this Final Judgment, Microsoft shall submit to the Court and the Plaintiffs a proposed plan of divestiture. The Plaintiffs shall submit any objections to the proposed plan of divestiture to the Court within 60 days of receipt of the plan, and Microsoft shall submit its response within 30 days of receipt of the plaintiffs’ objections.

b. Following approval of a final plan of divestiture by the Court (the “Plan”)(1) (and the expiration of the stay pending appeal set forth in section 6.a), Microsoft shall implement such Plan.

c. The Plan shall provide for the completion, within 12 months of the expiration of the stay pending appeal set forth in section 6.a., of the following steps:

i. The separation of the Operating Systems Business from the Applications Business, and the transfer of the assets of one of them (the “Separated

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1 Definitions of capitalized terms are set forth in section 7, below.
Business") to a separate entity along with (a) all personnel, systems, and other tangible and intangible assets (including Intellectual Property) used to develop, produce, distribute, market, promote, sell, license and support the products and services of the Separated Business, and (b) such other assets as are necessary to operate the Separated Business as an independent and economically viable entity.

ii. Intellectual Property that is used both in a product developed, distributed, or sold by the Applications Business and in a product developed, distributed, or sold by the Operating Systems Business as of April 27, 2000, shall be assigned to the Applications Business, and the Operating Systems Business shall be granted a perpetual, royalty-free license to license and distribute such Intellectual Property in its products, and, except with respect to such Intellectual Property related to the Internet browser, to develop, license and distribute modified or derivative versions of such Intellectual Property, provided that the Operating Systems Business does not grant rights to such versions to the Applications Business. In the case of such Intellectual Property that is related to the Internet browser, the license shall not grant the Operating Systems Business any right to develop, license, or distribute modified or derivative versions of the Internet browser.

iii. The transfer of ownership of the Separated Business by means of a distribution of stock of the Separated Business to Non-Covered Shareholders of Microsoft, or by other disposition that does not result in a Covered Shareholder owning stock in both the Separated Business and the Remaining Business.

d. Until Implementation of the Plan, Microsoft shall:

i. preserve, maintain, and operate the Operating Systems Business and the Applications Business as ongoing, economically viable businesses, with management, sales, products, and operations of each business held as separate, distinct and apart from one another as they were on April 27, 2000, except to provide the accounting, management, and information services or other necessary support functions provided by Microsoft prior to the entry of this Final Judgment;

ii. use all reasonable efforts to maintain and increase the sales and revenues of both the products produced or sold by the Operating Systems Business and those produced or sold by the Applications Business prior to the Implementation of the Plan and to support research and development and
business development efforts of both the Operating Systems Business and the Applications Business;

iii. take no action that undermines, frustrates, interferes with, or makes more difficult the divestiture required by this Final Judgment without the prior approval of the Court; and

iv. file a report with the Court 90 days after entry of this Final Judgment on the steps Microsoft has taken to comply with the requirements of this section 1.d.

2. Provisions Implementing Divestiture

a. After Implementation of the Plan, and throughout the term of this Final Judgment, neither the Operating Systems Business nor the Applications Business, nor any member of their respective Boards of Directors, shall acquire any securities or assets of the other Business; no Covered Shareholder holding securities of either the Operating Systems Business or the Applications Business shall acquire any securities or assets of or shall be an officer, director, or employee of the other Business; and no person who is an officer, director, or employee of the Operating Systems Business or the Applications Business shall be an officer, director, or employee of the other Business.

b. After Implementation of the Plan and throughout the term of this Final Judgment, the Operating Systems Business and the Applications Business shall be prohibited from:

i. merging or otherwise recombining, or entering into any joint venture with one another;

ii. entering into any Agreement with one another under which one of the Businesses develops, sells, licenses for sale or distribution, or distributes products or services (other than the technologies referred to in the following sentence) developed, sold, licensed, or distributed by the other Business;

iii. providing to the other any APIs, Technical Information, Communications Interfaces, or technical information that is not simultaneously published, disclosed, or made readily available to ISVs, IHVs, and OEMs; and

iv. licensing, selling or otherwise providing to the other Business any product or service on terms more favorable than those available to any similarly situated third party.
Section 2.b.ii shall not prohibit the Operating Systems Business and the Applications Business from licensing technologies (other than Middleware Products) to each other for use in each others' products or services provided that such technology (i) is not and has not been separately sold, licensed, or offered as a product, and (ii) is licensed on terms that are otherwise consistent with this Final Judgment.

c. Three months after Implementation of the Plan and once every three months thereafter throughout the term of this Final Judgment, the Operating Systems Business and the Applications Business shall file with the Plaintiffs a copy of each Agreement (and a memorandum describing each oral Agreement) entered into between them.

d. Throughout the term of this Final Judgment, Microsoft, the Operating Systems Business and the Applications Business shall be prohibited from taking adverse action against any person or entity in whole or in part because such person or entity provided evidence in this case.

e. The obligations and restrictions set forth in sections 3 and 4 herein shall, after the Implementation of the Plan, apply only to the Operating Systems Business.

3. Provisions In Effect Until Full Implementation of the Plan of Divestiture. The provisions in this section 3 shall remain in effect until the earlier of three years after the Implementation of the Plan or the expiration of the term of this Final Judgment.

a. OEM Relations.

i. Ban on Adverse Actions for Supporting Competing Products. Microsoft shall not take or threaten any action adversely affecting any OEM (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that OEM:

(1) to use, distribute, promote, license, develop, produce or sell any product or service that competes with any Microsoft product or service; or
(2) to exercise any of the options or alternatives provided under this Final Judgment.

ii. Uniform Terms for Windows Operating System Products Licensed to Covered OEMs. Microsoft shall license Windows Operating System Products to Covered OEMs pursuant to uniform license agreements with uniform terms and conditions and shall not employ market development allowances or discounts in connection with Windows Operating System Products. Without limiting the foregoing, Microsoft shall charge each Covered OEM the applicable royalty for Windows Operating System Products as set forth on a schedule, to be established by Microsoft and published on a web site accessible to plaintiffs and all Covered OEMs, that provides for uniform royalties for Windows Operating System Products, except that –

(1) the schedule may specify different royalties for different language versions, and

(2) the schedule may specify reasonable volume discounts based upon actual volume of total shipments of Windows Operating System Products.

Without limiting the foregoing, Microsoft shall afford Covered OEMs equal access to licensing terms; discounts; technical, marketing, and sales support; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos. The foregoing requirement insofar as it relates to access to technical information and information about future plans shall not apply to any bona fide joint development effort by Microsoft and a Covered OEM with respect to confidential matters within the scope of that effort. Microsoft shall not terminate a Covered OEM’s license for a Windows Operating System Product without having first given the Covered OEM written notice of the reason for the proposed termination and not less than thirty days’ opportunity to cure. Microsoft shall not enforce any provision in any Agreement with a Covered OEM that is inconsistent with this Final Judgment.

iii. OEM Flexibility in Product Configuration. Microsoft shall not restrict (by contract or otherwise, including but not limited to granting or withholding consideration) an OEM from modifying the boot sequence, startup folder, internet connection wizard, desktop, preferences, favorites, start page, first screen, or other aspect of a Windows Operating System Product to –
(1) include a registration sequence to obtain subscription or other information from the user;

(2) display icons of or otherwise feature other products or services, regardless of the size or shape of such icons or features, or to remove the icons, folders, start menu entries, or favorites of Microsoft products or services;

(3) display any user interfaces, provided that an icon is also displayed that allows the user to access the Windows user interface; or

(4) launch automatically any non-Microsoft Middleware, Operating System or application, offer its own Internet access provider or other start-up sequence, or offer an option to make non-Microsoft Middleware the Default Middleware and to remove the means of End-User Access for Microsoft’s Middleware Product.

b. Disclosure of APIs, Communications Interfaces and Technical Information.
Microsoft shall disclose to ISVs, IHVs, and OEMs in a Timely Manner, in whatever media Microsoft disseminates such information to its own personnel, all APIs, Technical Information and Communications Interfaces that Microsoft employs to enable –

i. Microsoft applications to interoperate with Microsoft Platform Software installed on the same Personal Computer, or

ii. a Microsoft Middleware Product to interoperate with Windows Operating System software (or Middleware distributed with such Operating System) installed on the same Personal Computer, or

iii. any Microsoft software installed on one computer (including but not limited to server Operating Systems and operating systems for handheld devices) to interoperate with a Windows Operating System (or Middleware distributed with such Operating System) installed on a Personal Computer.

To facilitate compliance, and monitoring of compliance, with the foregoing, Microsoft shall create a secure facility where qualified representatives of OEMs, ISVs, and IHVs shall be permitted to study, interrogate and interact with relevant and necessary portions of the source code and any related documentation of Microsoft Platform Software for the sole purpose of enabling their products to interoperate effectively with Microsoft Platform Software (including exercising any of the options in section 3.a.iii).
c. Knowing Interference with Performance. Microsoft shall not take any action that it knows will interfere with or degrade the performance of any non-Microsoft Middleware when interoperating with any Windows Operating System Product without notifying the supplier of such non-Microsoft Middleware in writing that Microsoft intends to take such action, Microsoft's reasons for taking the action, and any ways known to Microsoft for the supplier to avoid or reduce interference with, or the degrading of, the performance of the supplier's Middleware.

d. Developer Relations. Microsoft shall not take or threaten any action affecting any ISV or IHV (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that ISV or IHV to –

i. use, distribute, promote or support any Microsoft product or service, or

ii. develop, use, distribute, promote or support software that runs on non-Microsoft Middleware or a non-Microsoft Operating System or that competes with any Microsoft product or service, or

iii. exercise any of the options or alternatives provided under this Final Judgment.

e. Ban on Exclusive Dealing. Microsoft shall not enter into or enforce any Agreement in which a third party agrees, or is offered or granted consideration, to –

i. restrict its development, production, distribution, promotion or use of, or payment for, any non-Microsoft Platform Software,

ii. distribute, promote or use any Microsoft Platform Software exclusively,

iii. degrade the performance of any non-Microsoft Platform Software, or

iv. in the case of an agreement with an Internet access provider or Internet content provider, distribute, promote or use Microsoft software in exchange for placement with respect to any aspect of a Windows Operating System Product.

f. Ban on Contractual Tying. Microsoft shall not condition the granting of a Windows Operating System Product license, or the terms or administration of
such license, on an OEM or other licensee agreeing to license, promote, or distribute any other Microsoft software product that Microsoft distributes separately from the Windows Operating System Product in the retail channel or through Internet access providers, Internet content providers, ISVs or OEMs, whether or not for a separate or positive price.

g. Restriction on Binding Middleware Products to Operating System Products. Microsoft shall not, in any Operating System Product distributed six or more months after the effective date of this Final Judgment, Bind any Middleware Product to a Windows Operating System unless:

i. Microsoft also offers an otherwise identical version of that Operating System Product in which all means of End-User Access to that Middleware Product can readily be removed (a) by OEMs as part of standard OEM preinstallation kits and (b) by end users using add-remove utilities readily accessible in the initial boot process and from the Windows desktop; and

ii. when an OEM removes End-User Access to a Middleware Product from any Personal Computer on which Windows is preinstalled, the royalty paid by that OEM for that copy of Windows is reduced in an amount not less than the product of the otherwise applicable royalty and the ratio of the number of amount in bytes of binary code of (a) the Middleware Product as distributed separately from a Windows Operating System Product to (b) the applicable version of Windows.

h. Agreements Limiting Competition. Microsoft shall not offer, agree to provide, or provide any consideration to any actual or potential Platform Software competitor in exchange for such competitor’s agreeing to refrain or refraining in whole or in part from developing, licensing, promoting or distributing any Operating System Product or Middleware Product competitive with any Windows Operating System Product or Middleware Product.

i. Continued Licensing of Predecessor Version. Microsoft shall, when it makes a major Windows Operating System Product release (such as Windows 95, OSR 2.0, OSR 2.5, Windows 98, Windows 2000 Professional, Windows "Millennium," "Whistler," "Blackcomb," and successors to these), continue for three years after said release to license on the same terms and conditions the previous Windows Operating System Product to any OEM that desires such a license. The net royalty rate for the previous Windows Operating System Product shall be no more than the average royalty paid by the OEM for such Product prior to the release. The OEM shall be free to market Personal Computers in which it preinstalls such
an Operating System Product in the same manner in which it markets Personal Computers preinstalled with other Windows Operating System Products.

4. Internal Antitrust Compliance. This section shall remain in effect throughout the term of this Final Judgment, provided that, consistent with section 2.e, this section shall not apply to the Applications Business after the Implementation of the Plan.

a. Within 90 days after the effective date of this Final Judgment, Microsoft shall establish a Compliance Committee of its corporate Board of Directors, consisting of not fewer than three members of the Board of Directors who are not present or former employees of Microsoft.

b. The Compliance Committee shall hire a Chief Compliance Officer, who shall report directly to the Compliance Committee and to the Chief Executive Officer of Microsoft.

c. The Chief Compliance Officer shall be responsible for development and supervision of Microsoft’s internal programs to ensure compliance with the antitrust laws and this Final Judgment.

d. Microsoft shall give the Chief Compliance Officer sufficient authority and resources to discharge the responsibilities listed herein.

e. The Chief Compliance Officer shall:

i. within 90 days after entry of this Final Judgment, cause to be delivered to each Microsoft officer, director, and Manager, and each platform software developer and employee involved in relations with OEMs, ISVs, or IHVs, a copy of this Final Judgment together with additional informational materials describing the conduct prohibited and required by this Final Judgment;

ii. distribute in a timely manner a copy of this Final Judgment and such additional informational materials to any person who succeeds to a position of officer, director, or Manager, or platform software developer or employee involved in relations with OEMs, ISVs or IHVs;

iii. obtain from each officer, director, and Manager, and each platform software developer and employee involved in relations with OEMs, ISVs or IHVs, within 90 days of entry of this Final Judgment, and for each person thereafter succeeding to such a position within 5 days of such succession, a written certification that he or she:
(1) has read, understands, and agrees to abide by the terms of this Final Judgment; and

(2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;

iv. maintain a record of persons to whom this Final Judgment has been distributed and from whom, pursuant to Section 4.e.iii, such certifications have been obtained;

v. establish and maintain a means by which employees can report potential violations of this Final Judgment or the antitrust laws on a confidential basis; and

vi. report immediately to Plaintiffs and the Court any violation of this Final Judgment.

f. The Chief Compliance Officer may be removed only by the Chief Executive Officer with the concurrence of the Compliance Committee.

g. Microsoft shall, with the supervision of the Chief Compliance Officer, maintain for a period of at least four years the e-mail of all Microsoft officers, directors and managers engaged in software development, marketing, sales and developer relations related to Platform Software.

5. Compliance Inspection. This section shall remain in effect throughout the term of this Final Judgment.

a. For purposes of determining or securing implementation of or compliance with this Final Judgment, including the provisions requiring a plan of divestiture, or determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time:

i. Duly authorized representatives of a Plaintiff, upon the written request of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, or the Attorney General of a Plaintiff State, as the case may be, and on reasonable notice to Microsoft made to its principal office, shall be permitted:

(1) Access during office hours to inspect and copy or, at Plaintiffs’ option, demand Microsoft provide copies of all books, ledgers, accounts, correspondence, memoranda, source code, and other records and
documents in the possession or under the control of Microsoft (which may have counsel present), relating to the matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of Microsoft and without restraint or interference from it, to interview, either informally or on the record, its officers, employees, and agents, who may have their individual counsel present, regarding any such matters.

ii. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, or the Attorney General of a Plaintiff State, as the case may be, made to Microsoft at its principal offices, Microsoft shall submit such written reports, under oath if requested, as may be requested with respect to any matter contained in this Final Judgment.

iii. No information or documents obtained by the means provided in this section shall be divulged by a representative of a Plaintiff to any person other than a duly authorized representative of a Plaintiff, except in the course of legal proceedings to which the Plaintiff is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

iv. If at the time information or documents are furnished by Microsoft to a Plaintiff, Microsoft represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Microsoft marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 calendar days notice shall be given by a Plaintiff to Microsoft prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Microsoft is not a party.

6. Effective Date, Term, Retention of Jurisdiction, Modification.

a. This Final Judgment shall take effect 90 days after the date on which it is entered; provided, however that sections 1.b and 2 (except 2.d) shall be stayed pending completion of any appeals from this Final Judgment.

b. Except as provided in section 2.e, the provisions of this Final Judgment apply to Microsoft as defined in section 7.o of this Final Judgment.
c. This Final Judgment shall expire at the end of ten years from the date on which it takes effect.

d. The Court may act sua sponte to issue orders or directions for the construction or carrying out of this Final Judgment, for the enforcement of compliance therewith, and for the punishment of any violation thereof.

e. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.

f. In accordance with the Court's Conclusions of Law, the plaintiff States shall submit a motion for costs and fees, with supporting documents as necessary, no later than 45 days after the entry of this Final Judgment.

7. Definitions.

a. “Agreement” means any agreement, arrangement, alliance, understanding or joint venture, whether written or oral.

b. “Application Programming Interfaces (APIs)” means the interfaces, service provider interfaces, and protocols that enable a hardware device or an application, Middleware, or server Operating System to obtain services from (or provide services in response to requests from) Platform Software in a Personal Computer and to use, benefit from, and rely on the resources, facilities, and capabilities of such Platform Software.

c. “Applications Business” means all businesses carried on by Microsoft Corporation on the effective date of this Final Judgment except the Operating Systems Business. Applications Business includes but is not limited to the development, licensing, promotion, and support of client and server applications and Middleware (e.g., Office, BackOffice, Internet Information Server, SQL Server, etc.), Internet Explorer, Mobile Explorer and other web browsers, Streaming Audio and Video client and server software, transaction server software, SNA server software, indexing server software, XML servers and parsers, Microsoft Management Server, Java virtual machines, Frontpage Express (and other web authoring tools), Outlook Express (and other e-mail clients), Media player, voice recognition software, Net Meeting (and other collaboration software), developer tools, hardware, MSN, MSNBC, Slate, Expedia, and all investments owned by Microsoft in partners or joint ventures, or in ISVs, IHVs,
OEMs or other distributors, developers, and promoters of Microsoft products, or in other information technology or communications businesses.

d. “Bind” means to include a product in an Operating System Product in such a way that either an OEM or an end user cannot readily remove or uninstall the product.

e. “Business” means the Operating Systems Business or the Applications Business.

f. “Communications Interfaces” means the interfaces and protocols that enable software installed on other computers (including servers and handheld devices) to interoperate with the Microsoft Platform Software on a Personal Computer.

g. “Covered OEM” means one of the 20 OEMs with the highest volume of licenses of Windows Operating System Products from Microsoft in the calendar year preceding the effective date of the Final Judgment. At the beginning of each year, starting on January 1, 2002, Microsoft shall redetermine the Covered OEMs for the new calendar year, based on sales volume during the preceding calendar year.

h. “Covered Shareholder” means a shareholder of Microsoft on the date of entry of this Final Judgment who is a present or former employee, officer or director of Microsoft and who owns directly or beneficially more than 5 percent of the voting stock of the firm.

i. “Default Middleware” means Middleware configured to launch automatically (that is, by “default”) to provide particular functionality when other Middleware has not been selected for this purpose. For example, a default browser is Middleware configured to launch automatically to display Web pages transmitted over the Internet or an intranet that bear the .htm extension, when other software has not been selected for this purpose.

j. “End-User Access” means the invocation of Middleware directly or indirectly by an end user of a Personal Computer or the ability of such an end user to invoke Middleware. “End-User Access” includes invocation of Middleware by end users which is compelled by the design of the Operating System Product.

k. “IHV” means an independent hardware vendor that develops hardware to be included in or used with a Personal Computer.

l. “Implementation of the Plan” means full completion of all of the steps described in section 1.c.

m. “Intellectual Property” means copyrights, patents, trademarks and trade secrets used by Microsoft or licensed by Microsoft to third parties.
n. "ISV" means any entity other than Microsoft (or any subsidiary, division, or other operating unit of any such other entity) that is engaged in the development and licensing (or other marketing) of software products intended to interoperate with Microsoft Platform Software.

o. "Manager" means a Microsoft employee who is responsible for the direct or indirect supervision of more than 100 other employees.

p. "Microsoft" means Microsoft Corporation, the Separated Business, the Remaining Business, their successors and assigns (including any transferee or assignee of any ownership rights to, control of, or ability to license the patents referred to in this Final Judgment), their subsidiaries, affiliates, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.

q. "Middleware" means software that operates, directly or through other software, between an Operating System and another type of software (such as an application, a server Operating System, or a database management system) by offering services via APIs or Communications Interfaces to such other software, and could, if ported to or interoperable with multiple Operating Systems, enable software products written for that Middleware to be run on multiple Operating System Products. Examples of Middleware within the meaning of this Final Judgment include Internet browsers, e-mail client software, multimedia viewing software, Office, and the Java Virtual Machine. Examples of software that are not Middleware within the meaning of this Final Judgment are disk compression and memory management.

r. "Middleware Product" means

i. Internet browsers, e-mail client software, multimedia viewing software, instant messaging software, and voice recognition software, or

ii. software distributed by Microsoft that –

   (1) is, or has in the applicable preceding year been, distributed separately from an Operating System Product in the retail channel or through Internet access providers, Internet content providers, ISVs or OEMs, and

   (2) provides functionality similar to that provided by Middleware offered by a competitor to Microsoft.

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s. "Non-Covered Shareholder" means a shareholder of Microsoft on the record date for the transaction that effects the transfer of ownership of the Separated Business under Section 1.c.iii who is not a Covered Shareholder on the date of entry of this Final Judgment.

t. "OEM" means the manufacturer or assembler of a personal computer.

u. "Operating System" means the software that controls the allocation and usage of hardware resources (such as memory, central processing unit time, disk space, and peripheral devices) of a computer, providing a "platform" by exposing APIs that applications use to "call upon" the Operating System's underlying software routines in order to perform functions.

v. "Operating System Product" means an Operating System and additional software shipped with the Operating System, whether or not such additional software is marketed for a positive price. An Operating System Product includes Operating System Product upgrades that may be distributed separately from the Operating System Product.

w. "Operating Systems Business" means the development, licensing, promotion, and support of Operating System Products for computing devices including but not limited to (i) Personal Computers, (ii) other computers based on Intel x86 or competitive microprocessors, such as servers, (iii) handheld devices such as personal digital assistants and cellular telephones, and (iv) television set-top boxes.

x. "Personal Computer" means any computer configured so that its primary purpose is to be used by one person at a time, that uses a video display and keyboard (whether or not the video display and keyboard are actually included), and that contains an Intel x86, successor, or competitive microprocessor, and computers that are commercial substitutes for such computers.

y. "Plaintiff" means the United States or any of the plaintiff States in this action.

z. "Plan" means the final plan of divestiture approved by the Court.

aa. "Platform Software" means an Operating System or Middleware or a combination of an Operating System and Middleware.

bb. "Remaining Business" means whichever of the Operating Systems Business and the Applications Businesses is not transferred to a separate entity pursuant to the Plan.
cc. “Separated Business” means whichever of the Operating Systems Business and
the Applications Businesses is transferred to a separate entity pursuant to the Plan.

dd. “Technical Information” means all information regarding the identification and
means of using APIs and Communications Interfaces that competent software
developers require to make their products running on any computer interoperate
effectively with Microsoft Platform Software running on a Personal Computer.
Technical information includes but is not limited to reference implementations,
communications protocols, file formats, data formats, syntaxes and grammars,
data structure definitions and layouts, error codes, memory allocation and
deallocation conventions, threading and synchronization conventions, functional
specifications and descriptions, algorithms for data translation or reformatting
(including compression/decompression algorithms and encryption/decryption
algorithms), registry settings, and field contents.

ee. “Timely Manner”: disclosure of APIs, Technical Information and
Communications Interfaces in a timely manner means, at a minimum, publication
on a web site accessible by ISVs, IHVs, and OEMs at the earliest of the time that
such APIs, Technical Information, or Communications Interfaces are (1) disclosed
to Microsoft’s applications developers, (2) used by Microsoft’s own Platform
Software developers in software released by Microsoft in alpha, beta, release
candidate, final or other form, (3) disclosed to any third party, or (4) within 90
days of a final release of a Windows Operating System Product, no less than 5
days after a material change is made between the most recent beta or release
candidate version and the final release.

ff. “Windows Operating System Product” means software code (including source
code and binary code, and any other form in which Microsoft distributes its
Windows Operating Systems for Personal Computers) of Windows 95, Windows
98, Windows 2000 Professional, and their successors, including the Windows
Operating Systems for Personal Computers codenamed “Millennium,”
“Whistler,” and “Blackcomb,” and their successors.

[Signature]
Thomas Penfield Jackson
U.S. District Judge
Massachusetts v. Microsoft Corp.
373 F.3d 1199 (D.C. Cir. 2004)

GINSBURG, Chief Judge: In United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001) (Microsoft III), we affirmed in part and reversed in part the judgment of the district court holding Microsoft had violated §§ 1 and 2 of the Sherman Antitrust Act, vacated the associated remedial order, and directed the district court, on the basis of further proceedings, to devise a remedy “tailored to fit the wrong creating the occasion” therefor, id. at 107, 118-19. On remand, the United States and certain of the plaintiff states entered into a settlement agreement with Microsoft. Pursuant to the Antitrust Procedures and Penalties (Tunney) Act, 15 U.S.C. §§ 16(b)-(h), the district court held the parties’ proposed consent decree, as amended to allow the court to act sua sponte to enforce the decree, was in “the public interest.” Meanwhile, the Commonwealth of Massachusetts and several other plaintiff states refused to settle with Microsoft and instead litigated to judgment a separate remedial decree. The judgment entered by the district court in their case closely parallels the consent decree negotiated by the United States.

Massachusetts alone appeals the district court’s entry of that decree. ***

A. Remedial Proposals

Massachusetts objects to several provisions the district court included in the remedial decree. The Commonwealth also appeals the district court’s refusal to adopt certain other provisions proposed by the States.

1. Commingling

In Microsoft III we upheld the district court’s finding that Microsoft’s integration of IE and the Windows operating system generally “prevented OEMs from pre-installing other browsers and deterred consumers from using them.” 253 F.3d at 63-64. Because they could not remove IE, installing another browser meant the OEM would incur the costs of supporting two browsers. Id. at 64. *** Accordingly, the district court instead approved the proposed requirement that Microsoft “permit OEMs to remove end-user access to aspects of the Windows operating system which perform middleware functionality.” States’ Remedy, at 159. Specifically, § III.H of the decree requires Microsoft to “[a]llow end users ... and OEMs ... to enable or remove access to each Microsoft Middleware Product or Non-Microsoft Middleware Product....” Id. at 270. ***

The district court’s decision to fashion a remedy directed at the effect of Microsoft’s commingling, rather than to prohibit commingling, was within its discretion. *** The district court fashioned a remedy aimed at reducing the costs an OEM might face in having to support multiple internet browsers. The court thereby addressed itself to Microsoft’s efforts to reduce software developers’ interest in writing to the Application Program Interfaces (APIs) exposed by any operating system other than Windows. Far from abusing its discretion, therefore, the district court, by remediying the anticompetitive effect of commingling, went to the heart of the problem Microsoft had created, and it did so without intruding itself into the design and engineering of the Windows operating system. We say, Well done!

But soft! Massachusetts and the amici claim the district court nonetheless erred in rejecting a “code removal” remedy for Microsoft’s commingling, principally insofar as the court was concerned with “Microsoft’s ability to provide a consistent API set,”
which Microsoft referred to as the problem of Windows’ “fragmentation.” They argue that any effort to keep software developers writing to Microsoft’s APIs—and thereby avoiding “fragmentation”—is not procompetitive but rather “an argument against competition.” ***

Letting a thousand flowers bloom is usually a good idea, but here the court found evidence, as discussed above, that such drastic fragmentation would likely harm consumers. Although it is almost certainly true, as both Massachusetts and the amici claim, that such fragmentation would also pose a threat to Microsoft’s ability to keep software developers focused upon its APIs, addressing the applications barrier to entry in a manner likely to harm consumers is not self-evidently an appropriate way to remedy an antitrust violation.

The district court’s end-user access provision fosters competition by opening the channels of distribution to non-Microsoft middleware. It was Microsoft’s foreclosure of those channels that squelched nascent middleware threats and furthered the dominance of the API set exposed by its operating system. The exclusive contracts into which Microsoft entered with IAPs were likewise aimed at foreclosing channels through which rival middleware might otherwise have been distributed. Prohibiting Microsoft from continuing those exclusive arrangements, see States’ Remedy § III.G, at 269-70, would not have the same deleterious effect upon consumers as would the fragmentation of Windows. ***

3. Forward-looking provisions

The district court exercised its discretion to fashion appropriate relief by adopting what it called “forward-looking” provisions, which require Microsoft to disclose certain of its APIs and communications protocols. Although non-disclosure of this proprietary information had played no role in our holding Microsoft violated the antitrust laws, “both proposed remedies recommend[ed] the mandatory disclosure of certain Microsoft APIs, technical information, and communications protocols for the purposes of fostering interoperation.” States’ Remedy, at 171. In approving a form of such disclosure—while, as discussed below, rejecting the States’ proposal for vastly more—the district court explained “the remedy [must] not [be] so expansive as to be unduly regulatory or provide a blanket prohibition on all future anticompetitive conduct.” Id. (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133 (1969)). ***

a. Disclosure of APIs

The district court recognized the “hallmark of the platform threat” to the Windows monopoly posed by rival middleware is the ability to run on multiple operating systems: The “ready ability to interoperate with the already dominant operating system will bolster the ability of such middleware to support a wide range of applications so as to serve as a platform.” States’ Remedy, at 172. In order to facilitate such interoperation the district court required Microsoft to disclose APIs “used by Microsoft Middleware to interoperate with a Windows Operating System Product.” Id. § III.D, at 268. ***

Massachusetts further argues the district court made no finding the required disclosure of APIs under the decree would “meaningfully assist” developers of middleware. Massachusetts objects both to the breadth of disclosure—that is, the number of APIs to be disclosed under § III.D—and to the “depth” or detail of the disclosure, with respect to which Massachusetts claims “the remedy fails to require the disclosure of
sufficient information to ensure that the mandated disclosure may be effectively utilized.”

In sum, the district court’s findings are fully adequate to support its decision with respect to disclosure. We do not find persuasive Massachusetts’ arguments that the district court overstated or misapprehended the significance of the disclosure required by the decree. In light of the forward-looking nature of the API disclosure provision, the court reasonably balanced its goal of enhanced interoperability with the need to avoid requiring overly broad disclosure, which it determined could have adverse economic and technological effects, including the cloning of Microsoft’s software. Moreover, we cannot overlook the threat—as documented in the district court’s findings of fact in the liability phase—posed by Netscape and Java, which relied upon Microsoft’s then more limited disclosure of APIs. Microsoft managed to squelch those threats, at least for a time, but that does not diminish the competitive significance of the disclosure of Microsoft’s APIs, a disclosure enhanced by the decree.

We therefore hold the district court did not abuse its discretion in fashioning the remedial provision concerning Microsoft’s disclosure of APIs.

b. Disclosure of communications protocols

The district court also included in the decree a provision requiring Microsoft to disclose certain communications protocols. See States’ Remedy § III.E, at 269. As with APIs, we did not hold Microsoft’s disclosure practices with respect to communications protocols violated § 2 of the Sherman Act. Communications protocols involve technologies—servers and server operating systems—that are not “middleware” as we used that term in our prior decision. See Microsoft III, at 53-54. It is therefore not surprising the district court described the provision requiring the disclosure of communications protocols as the “most forward-looking” in the decree. States’ Remedy, at 173 (emphasis in original).

Communications protocols provide a common “language” for “clients” and “servers” in a computing network. A network typically involves interoperation between one or more large, central computers (the servers) and a number of PCs (the clients). By interoperating with the server, the clients may communicate with each other and store data or run applications directly on the server. The district court found that servers may use any of several different operating systems, id. at 121, but most clients run a version of Windows.”

Massachusetts argues § III.E will not enhance interoperability and there is no evidence, and the district court made no finding, that it will. Microsoft responds that “a substantial degree of interoperability already exists between Windows desktop operating systems and non-Microsoft server operating systems” and the ability of third parties to license those protocols from Microsoft pursuant to § III.E will enhance interoperability. The parties’ divergent predictions point up the difficulties inherent in crafting a forward-looking provision concerning a type of business conduct as to which there has not been a violation of the law.

Massachusetts objects that the district court should not have limited the disclosure requirement of § III.E to protocols for native communications, which the district court found is only “one of at least five basic approaches to achieving interoperability between Windows client operating systems and non-Microsoft server operating systems.” States’ Remedy, at 234 (citing Short ¶ 35, 6 J.A. (II) at 3535). We think the district
court prudently sought not to achieve complete interoperability but only to “advance” the ability of non-Microsoft server operating systems to interoperate with Windows and thereby serve as platforms for applications. It was not an abuse of discretion for the court not to go further; indeed, to have done so in the absence of related liability findings would have been risky. ***

4. Web Services

Massachusetts next argues the district court erred by failing to adopt a remedy addressed to Web services. In particular, Massachusetts claims the court should have extended Microsoft’s disclosure obligation beyond interoperation of server operating systems and PCs running Windows to reach interoperation among “other nodes of the network encompassed by network-based computing and the Web services paradigm, such as multiple servers or handheld devices.” 17 Microsoft responds by pointing out there was no mention of Web services in the liability phase of this case, and by claiming it has no monopoly power in the market for Web services, “if such a [market] exists.” Also, the district court found “Web-browsing software of the type addressed during the liability phase will play no role in the creation, delivery, or use of many Web services.” States’ Remedy, at 127.

*** Far from ignoring this area of rapid innovation, as Massachusetts claims, the district court concluded Web services are simply too far removed from the source of Microsoft’s liability in this case—as to which the relevant market is operating systems for Intel-compatible PCs—to be implicated in the remedy. Nor did the court think the States had sufficiently “explained how the increase in the use of non-PC devices in conjunction with Web services will reduce Microsoft’s monopoly in the market for PC operating systems.” Id. at 134.

Massachusetts claims the district court excluded Web services based upon the clearly erroneous premise “that this new paradigm is a threat to the PC, and not to Windows.” For a correct understanding Massachusetts points us to the testimony of Jonathon Schwartz, Chief Strategy Officer at Sun Microsystems: “[S]o long as consumers can access Web services using competing devices and operating systems, they are free to switch away from Windows if competing alternatives are more attractive.” Direct Testimony ¶ 37, 2 J.A. (II) at 882. According to Massachusetts, the district court acknowledged as much when it stated:

The Chief Strategy Officer for Sun Microsystems, Inc., Jonathon Schwartz, testifying on behalf of Plaintiffs … theorized that “[i]f the most popular applications are delivered as Web services, instead of [as] stand-alone PC applications, the applications barrier protecting Windows could be substantially eroded.”

States’ Remedy, at 127 (brackets in original). Clearly, however, the district court expressed its view that Schwartz was “theoriz[ing],” not stating a conclusion based upon fact. In any event, the district court was primarily—and correctly—focused upon whether a provision addressing Web services could be linked to Microsoft’s liability in Microsoft III; it could not.

17 Although Massachusetts does not mention it, the States’ proposal would have done just that, see SPR § C, 6 J.A. (II) at 3172; see also SPR § A, id. at 3172-73, extending Microsoft’s disclosure obligation to interoperability with respect to, among others, “Handheld Computing Devices”—a term defined in the SPR to include “cellular telephone[s], personal digital assistant[s], and Pocket PC[s],” SPR § 22.k, id. at 3194.
Moreover, it does not follow that, because a proposed requirement could reduce the applications barrier to entry, it must be adopted. Recall the applications barrier to entry arose only in part because of Microsoft’s unlawful practices; it was also the product of “positive network effects.” 84 F.Supp.2d at 20. If the court is not to risk harming consumers, then the remedy must address the applications barrier to entry in a manner traceable to our decision in *Microsoft III*. This the decree does by opening the channels of distribution for non-Microsoft middleware. The district court reasonably determined, based upon evidence in the record, a provision addressing Web services might not be so benign. *States’ Remedy*, at 134. ***

6. Open Source Internet Explorer

Massachusetts argues the district court abused its discretion in rejecting the States’”open-source IE” provision, which would require that

Microsoft ... disclose and license all source code for all Browser software [and that the license] grant a royalty-free, non-exclusive perpetual right on a non-discriminatory basis to make, use, modify and distribute without limitation products implementing or derived from Microsoft’s source code....

SPR § 12, 6 J.A. (II) at 3178. Microsoft responds that this type of remedy is unnecessary because the decree already proscribes the anticompetitive conduct by which Microsoft had unlawfully raised the applications barrier to entry and thereby diminished the threat posed by platforms rivaling Microsoft’s operating system.

The district court rejected the States’ proposal for three reasons. First, the open-source IE proposal “ignores the theory of liability in this case,” which was directed at Microsoft’s unlawful “response to cross-platform applications, not operating systems,” *States’ Remedy*, at 185; the proposed remedy would directly benefit makers of non-Microsoft operating systems, even though the harm, if any, to them was indirect. Second, the proposal would “provide [a] significant benefit to competitors but [has] not been shown to benefit competition.” *Id.* Finally, the proposal would work a “de facto divestiture” and therefore should be analyzed as a structural remedy pursuant to this court’s opinion on liability. *Id.* at 186. Here the court carefully considered the “causal connection” between Microsoft’s anticompetitive conduct and its dominance of the market for operating systems, and held the causal link insufficient to warrant a structural remedy. *States’ Remedy*, at 186.

Massachusetts argues the district court “improperly ignored evidence that IE’s dominance is competitively important for Microsoft” and complains that Microsoft “advantage[s] its own middleware by using the browser to limit the functionality of competing products.” These are not objections, however, to the district court’s reasons for rejecting the States’ proposal. Rather, they are criticisms of what Massachusetts terms the district court’s “implicit determination that [certain] facts were not relevant” to its analysis of the open-source IE provision. For instance, Massachusetts points to the testimony of David Richards of RealNetworks stating there would be “substantial end user benefit” if Microsoft disclosed enough APIs to allow competitors such as RealNetworks to create their own versions of the “Media Bar,” one of Microsoft’s recent additions to the IE interface. According to Richards, the Media Bar is a version of Microsoft’s Windows Media Player “embedded as the default media player” in IE. ¶ 79, *id.* at 1094-95. If Microsoft were to disclose the internal architecture of the Media Bar, including the APIs upon which it relies, he says, then end users could “play back more digital formats within the [IE] browser than [Microsoft’s] Windows Media
Player, including our own RealAudio and RealVideo formats.” ¶¶ 81, 82, id. at 1098. ***

The district court’s premise, as discussed more fully below, was that the fruit of Microsoft’s unlawful conduct was not the harm particular competitors may have suffered but rather Microsoft’s freedom from platform threats posed by makers of rival middleware. See Part II.B.1. The district court properly focused, therefore, upon opening the channels of distribution to such rivals; facts tending to show harm to specific competitors are not relevant to that task. Also recall the district court was properly concerned with avoiding a disclosure requirement so broad it could lead to the cloning of Microsoft’s products. That, in essence, appears to be what the cited testimony would require with respect to Microsoft’s Media Bar. ***

Massachusetts next argues the district court “misunderstood” that the States’ open-source IE proposal could “reestablish a cross-platform browser,” thereby allowing applications to be written to APIs exposed by IE and, as a result, lower the applications barrier to entry. As discussed in preceding sections of this opinion, the decree the district court approved includes several provisions addressed directly to Microsoft’s efforts to extinguish nascent threats to its operating system. Specifically, the decree restores the conditions necessary for rival middleware to serve as a platform threat to Windows and thereby speaks directly to our holding with respect to liability. See Microsoft III. Moreover, the district court found the States’ open-source IE proposal ignores the theory of liability in this case not because the court “misunderstood” the implications of the proposal but because the proposal would most likely benefit makers of competing operating systems, namely, Apple and Linux, rather than restore competitive conditions for potential developers of rival middleware. States’ Remedy, at 242-43. That is why the court concluded the open-source IE proposal would help specific competitors but not the process of competition. There is more than one way to redress Microsoft’s having unlawfully raised the applications barrier. And it was certainly within the district court’s discretion to address the applications barrier to entry as it did, namely, by restoring the conditions in which rival makers of middleware may freely compete with Windows. Indeed, to have addressed itself narrowly to aiding specific competitors, let alone competitors that were not the target of Microsoft’s unlawful efforts to maintain its monopoly, could well have put the remedy in opposition to the purpose of the antitrust laws.

Massachusetts also complains the district court, in rejecting the open-source IE provision, erred by probing the causal connection between Microsoft’s unlawful acts and harm to consumers. In response Microsoft points out that the district court viewed the States’ proposed relief as structural and therefore applied a test of causation along the lines we set out in Microsoft III. See 253 F.3d at 106-07. Our instruction to the district court was to consider on remand whether divestiture was an appropriate remedy in light of the “causal connection between Microsoft’s anticompetitive conduct and its dominant position in the ... market [for operating systems].” Id. at 106. ***

As Massachusetts correctly notes, we were there addressing the district court’s order to split Microsoft into two separate companies, whereas on remand, the district court was addressing the States’ open-source IE proposal. But the district court reasonably analogized that proposal to a divestiture of Microsoft’s assets. States’ Remedy, at 185, 244. The court pointed to testimony both of Microsoft’s and of the States’ economic experts characterizing the open-source IE remedy as “structural” in nature. Id. at 244.
Although Microsoft could continue to use its intellectual property under the open-source IE proposal, the “royalty-free, non-exclusive perpetual right” of others to use it as well would confiscate much of the value of Microsoft’s investment, which Gates put at more than $750 million, ¶ 128, 8 J.A. (II) at 4714, and the court clearly found to be of considerable value. See States’ Remedy, at 241, 244.

Massachusetts claims United States v. National Lead Co., 332 U.S. 319 (1947), upheld compulsory licensing as a remedy while at the same time rejecting the need for divestiture. The licenses in National Lead, however, were not to be free; on the contrary, the Supreme Court specifically pointed out that reducing “all royalties automatically to a total of zero ... appears, on its face, to be inequitable without special proof to support such a conclusion.” Id. at 349. (The Court left open the possibility that royalties might be set at zero or at a nominal rate, but only where the patent was found to be of nominal value.) Here the States proposed Microsoft be required to license IE “royalty-free,” SPR § 12, 6 J.A. (II) at 3178. Therefore, National Lead is worse than no support for the States’ proposal; it tells us that proposal is “on its face ... inequitable.” 332 U.S. at 349.

Finally, Massachusetts claims the district court erred in rejecting the open-source IE proposal on the ground it “is predicated not upon the causal connection between Microsoft’s illegal acts and its position in the PC operating system market, but rather the connection between the illegal acts and the harm visited upon Navigator.” This plainly misstates the issue as we remanded it. We were concerned a drastic remedy, such as divestiture, would be inappropriate if Microsoft’s dominant position in the operating system market could not be attributed to its unlawful conduct. Microsoft III, at 106-07. The district court did not abuse its discretion by insisting that an analogous form of structural relief—namely, divesting Microsoft of much of the value of its intellectual property—likewise meets the test of causation. Massachusetts’ statement that the open-source IE provision “is predicated ... [upon] the connection between the illegal acts and the harm visited upon Navigator” highlights precisely why the district court was right to reject that provision: The remedy in this case must be addressed to the harm to competition, not the harm visited upon a competitor.

The district court’s remedy is appropriately addressed to the channels of distribution for non-Microsoft middleware, including rival browsers such as Netscape Navigator. The court did not abuse its discretion by refusing to adopt the States’ proposed open-source IE provision for the benefit of Microsoft’s competitors.

7. Java must-carry
Massachusetts argues the district court erred in refusing to require Microsoft to distribute with Windows or IE a Sun-compliant Java runtime environment, as the States had proposed. Consider:

For a period of 10 years from the date of entry of the Final Judgment, Microsoft shall distribute free of charge, in binary form, with all copies of its Windows Operating System Product and Browser ... a competitively performing Windows-compatible version of the Java runtime environment ... compliant with the latest Sun Microsystems Technology Compatibility Kit.

SPR § 13, 6 J.A. (II) at 3179-80. The district court rejected this proposal because it did not think appropriate a remedy that “singles out particular competitors and anoints them with special treatment not accorded to other competitors in the industry.” States’
Remedy, at 189. Microsoft adds that the proposal would give “Sun’s Java technology a free-ride on Microsoft’s OEM distribution channel.”

Massachusetts argues the district court was wrong as a matter of law in thinking that mandated distribution of Java would benefit a competitor and not competition: “If the district court were correct that broad distribution of Java did not benefit competition, then this Court could not have held that Microsoft’s undermining of Java’s distribution was anticompetitive.” Not surprisingly, this non sequitur misrepresents the reasoning of the district court. That court focused upon remedying Microsoft’s unlawful foreclosure of distribution channels for rival middleware, not upon propping up a particular competitor. Massachusetts also complains that if any measure that helps a “would-be competitor of a monopolist” is rejected out of hand, then “competition can never be restored to a monopolized market.” There is a real difference, however, between redressing the harm done to competition by providing aid to a particular competitor and redressing that harm by restoring conditions in which the competitive process is revived and any number of competitors may flourish (or not) based upon the merits of their offerings. Even in the latter instance, of course, a competitor identifiable ex ante may benefit but not because it was singled out for favorable treatment.

Massachusetts also complains the district court ignored evidence “that the widespread availability of the cross-platform Java runtime environment on PCs would reduce the applications barrier to entry.” According to Massachusetts, only if Java is available on PCs at “a percentage that approaches the percentage of PCs running Windows” will developers write to it. Testimony cited by Massachusetts extolling the benefits of Java ubiquity, e.g., Green ¶ 53, 2 J.A. (II) at 949; Shapiro ¶ 131, id. at 840, does not, however, call into question the district court’s rejection of the States’ proposal as “market engineering,” States’ Remedy, at 262 (quoting Murphy ¶ 239, 5 J.A. (II) at 2678), aimed at benefitting a specific competitor.

B. Cross-cutting Objections
Massachusetts also raises arguments that pertain to multiple provisions of the remedial decree. One such objection goes to the district court’s overall approach to fashioning a remedy.

1. “Fruits”
Massachusetts also objects that, because the district court did not require open-source IE licensing and mandatory distribution of Sun’s Java technology, the decree fails to “deny Microsoft the fruits of its exclusionary conduct.” *** The present decree, however, does not require that Microsoft be broken up. Nor did the district court adopt any other of the States’ proposals it deemed structural in nature—open-source IE, as discussed above, and the “porting” of Microsoft Office. The district court also specifically rejected the idea that IE was the fruit of Microsoft’s anticompetitive conduct, finding, “[n]either the evidentiary record from the liability phase, nor the record in this portion of the proceeding, establishes that the present success of IE is attributable entirely, or even in predominant part, to Microsoft’s illegal conduct.” States’ Remedy, at 185-86 n. 81; see also id. at 244 n. 121. Rather, the fruit of its violation was Microsoft’s freedom from the possibility rival middleware vendors would pose a threat to its monopoly of the market for Intel-compatible PC operating systems. The district court therefore reasonably identified opening the channels of distribution for rival middleware as an appropriate goal for its remedy. By “pry[ing] open” these channels, International Salt, 332 U.S. at 401 the district court denied Microsoft the ability again to limit
a nascent threat to its operating system monopoly. The district court certainly did not abuse its discretion by adopting a remedy that denies Microsoft the ability to take the same or similar actions to limit competition in the future rather than a remedy aimed narrowly at redressing the harm suffered by specific competitors in the past. This distinction underlies the difference between a case brought in equity by the Government and a damage action brought by a private plaintiff.

Massachusetts also complains the district court erred in applying a “stringent but-for test” of causation in determining whether “advantages gained by Microsoft could be considered a fruit of Microsoft’s illegality.” Here it points to a footnote in which the district court, in the course of rejecting the States’ open-source IE proposal, questioned the extent to which the success of IE could be traced to Microsoft’s unlawful conduct. See States’ Remedy, at 242 & n. 119. We have already determined the district court properly refused to impose that structural remedy without finding a significant causal connection “between Microsoft’s anticompetitive conduct and its dominant position in the ... market [for operating systems].” Microsoft III, at 106; see also Part II.A.6. More important, the fruit of Microsoft’s unlawful conduct, as mentioned, was its ability to deflect nascent threats to its operating system by limiting substantially the channels available for the distribution of non-Microsoft middleware. *** Finally, even if stunting Navigator and Java specifically were deemed the fruits of Microsoft’s violations, the decree would still be adequate because it opens the way to their distribution, both directly through the end-user access provision in § III.H and generally through the other conduct prohibitions found in § III of the decree. ***

IV. Conclusion

The remedial order of the district court in No. 02-7155 is affirmed. In No. 03-5030, the order denying intervention is reversed and the order approving the consent decree in the public interest is affirmed.

So ordered.